No. 97-1337

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA, Minnesota Department of Natural Resources; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, Minnesota Department of Natural Resources,

Petitioners,

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX
VOLUME V, Pages 1195 to 1509

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Tanner Cross (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[V-654] had mentioned some of the interaction between the missionaries and the Mille Lacs Band in particular, I believe, is that correct?

A. I think I mentioned the lack of contact between the missionaries and the Mille Lacs Band, although there was some.

Q. Had the Mille Lacs Band requested that missionaries come to them?

A. Yes, they had. They had been very generous. Particularly after the mission at Lake Pokegama was struck by the Sioux in 1841, they invited the missionaries to come over to Mille Lacs. But they never did.

Q. And, in general, was there a kind of tension that existed between the missionaries that would have not had them come to Mille Lacs? Or was there a reason why they didn't go to Mille Lacs?

A. I don't recall a statement in the missionary correspondence as to why they did not go to Mille Lacs. I think they had selected or chosen other fields that might be more fertile for their activities, although none of them had any conspicuous success among the Ojibwe at all.

I think I mentioned the fact that they thought they might have had seven converts at Lake Pokegama, but

seven of them were considered back-slid. And that's not a very reassuring record of achievement in conversion.

Q. It sounds like missionaries had kind of a tough task

* * *

[V-667] federal removal policy was concerned with removing Indians living east of the Mississippi to territory west of the Mississippi. These Sioux people were already living west of the Mississippi.

Q. Then it would be your opinion that the President would be unable to ask them to remove from their ceded lands to reservations at some point in time?

A. He did. They sold the land and accepted reservations. It turned out to be an unhappy situation. But the point I'm making is, the fact that the verb "remove" occurs doesn't mean it's part of the removal policy.

MR. SZOTKOWSKI: Your Honor, that's all the questions I have at this time.

THE COURT: Okay. Is somebody sitting in for Mr. Persian on this witness?

MR. THOMPSON: I will be substituting today, Your Honor.

THE COURT: Okay. Mr. Thompson?

CROSS-EXAMINATION

BY MR. THOMPSON:

Q. Dr. Tanner, my name is Randy Thompson. I represent the Landowners in this action.

Dr. Tanner, there was some discussion in a couple of places in your report, I believe on page 10, regarding the [V-668] conflict with the lumbermen and the dam on the Rum River and the Mille Lacs Indians that was apparently occurring – the dam was apparently built in 1849, and the conflict occurred for a number of years after that, is that correct?

A. Yes.

Q. Was it the understanding of the band members that the 1837 treaty prevented the lumbermen from building a dam across the Rum River in a way that it would prevent them from harvesting their wild rice?

A. I think that was the understanding of the Indians. And I think there's evidence that that view was shared by other people.

Q. So the Indians were claiming that the land couldn't be used in a way to interfere with the rights under the 1837 treaty, is that correct?

A. That the land couldn't be used in a way that would harm their efforts to gain their sustenance from the land, yes.

Q. You indicate on page 7 of your report that Minnesota Territory was still considered Indian country. Do you see that?

A. Yes.

Q. Was that referring to 1849?

A. Yes.

Q. What did you mean by "Indian country" when you used that term there?

* * *

[VI-691] Q. Do you know when this land was sought from the Red Lake Band, this northwest land?

A. I believe that the initial treaty with the Red Lake and Pembina people was in 1863. And, of course, they didn't sell all their land. Some land of the Red Lake's has never been ceded. But that was the time that the initial land cession on the part of Red Lake and Pembina Bands took place, I believe.

Q. Now, Article V of the '37 treaty, the one on hunting, fishing, and gathering, you indicate in your report was never mentioned in the proceedings of the 1855 treaty. Is that correct?

A. Yes.

Q. One explanation for that, isn't it, Dr. Tanner, that the government considered that the hunting, fishing, and gathering privileges had been ended by the 1850 order and hence were not necessary for discussion?

A. To me, that's an impossible interpretation of the documents.

Q. It is true, Dr. Tanner, isn't it, that after the 1855 treaty, that activities such as hunting, fishing, and gathering were engaged in in Mille Lacs County both by Indians and non-Indians alike?

A. Yes, it is.

Q. I think you made a comment Friday that you have to work to keep a cow alive in Minnesota, but a deer can feed itself.

* * *

Lund Cross (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[VI-758] Q. That's fair, Dr. Lund. You would agree, wouldn't you, that at least one body of state law limits and applies to Article V's privilege, wouldn't you?

A. Which body of state law is that, sir?

Q. Trespass law.

A. Yes, I think it does.

Q. Now, I don't see, and I think you would agree with me, that there's nothing in Article V that says only state trespass law applies, is there?

A. Article V does not expressly refer to trespass law.

Q. And you're not aware of anything in the journal of the treaty negotiations that would also refer to such a limitation?

A. As I earlier indicated, I know nothing whatever about the journal or treaty negotiations, and I approached this question from the plain meaning of the treaty on its face.

Q. When you indicate that state trespass law applies, is that state trespass laws that existed in 1837 – obviously, it would have been Wisconsin Territory law at that time – or is it the trespass law as it changes and is applied over time?

A. That's a question of treaty law. I've been able to give you my analysis based upon what the state trespass law was in 1837. The question whether state trespass law can be changed with reference to the privilege which Article V conveys is a question of treaty law about which I'm not competent to

* * *

[VI-768] just asking as a general matter of regulating fish and game law.

You wrote a book on wildlife law, and in that book you talked about the division of power between state and federal governments to regulate fish and game. Do you recall that, sir?

A. I'll make a concession to your question, and you tell me if this is the concession that you want. If the area which is in question is not part of an Indian reservation, and if the particular privilege is not related to a treaty, is the state the appropriate authority to regulate the particular taking of fish and game? And the answer is yes.

Q. Now, you indicated that although there was – let's back up. In terms of monopoly – that was one of the three categories of analysis – is it my understanding that a monopoly is an interest in land, a monopoly in fish and game?

A. Yes. According to my analysis, it is.

Q. Once the United States had granted to the Mille Lacs Band the privilege of hunting and fishing in the ceded area, could the United States then grant a monopoly to take fish from Mille Lacs Lake?

A. In other words, once the United States had entered into this privilege?

Q. Yes.

A. A treaty privilege?

[VI-769] Q. Yes.

A. Would a subsequent grant of a monopoly to another interest, another group of people, contravene the treaty privilege?

Q. Fair enough.

A. Then certainly you would anticipate that my answer would be, that is a question of treaty law, about which I'm not competent to speak.

Q. I'm not talking about treaty law. I'm talking about the privilege in the '37 treaty that you've analyzed, and I'm simply asking whether or not that privilege would be impaired in any way if the United States granted a monopoly in fish and game, another thing that you've analyzed, to another group of people?

A. I think I understand now what you're saying. You're saying if a monopoly were granted subsequent to this privilege, would that monopoly impair the privilege?

A. Yes.

Q. You don't want me to respond to as to whether it would be legally valid to impair the privilege; you just want me to respond as to whether the privilege would be impaired by the grant of a monopoly?

Q. Yes.

A. And I believe the privilege would be impaired by the grant of a monopoly, yes.

[VI-770] Q. And, therefore, the privilege has impaired the ability of the United States to act with regard to an interest it held in the land, hasn't it?

A. No, because I deny that the privilege concerns an interest in land.

Q. But the monopoly concerns an interest in land, doesn't it, sir?

A. If a monopoly is – I've lost your question. See if you can explain your question to me again.

Q. We'll move on. You indicated that the drafters of the '37 treaty were concerned about such matters as closed seasons and methods that might impact the Band's ability to exercise this privilege?

A. I've indicated that a person drafting the treaty with knowledge of the past exercise of the regulatory authority of the state would have been concerned with those regulations, yes.

Q. Wouldn't the Band have been concerned about state trespass law excluding them from exercising the privilege?

A. As I explained, I believe that a person viewing the trespass law of 1837 who was interested in hunting and fishing would not have been particularly concerned with regard to the state of trespass law, no.

Q. Well, instead of sending the request from the Territorial Legislature to the President, couldn't the Territorial [VI-771] Legislature have simply passed a law, then,

in 1849 that said that all non-citizens in Minnesota were prohibited from hunting and fishing on the '37 ceded area?

A. Certainly the State or the Territory could have passed such a law. Whether that law would prevail, in light of the conflict with the treaty, is entirely another question. As a matter of fact, on the basis of my interpretation of the purpose of the treaty, the purpose of the treaty was, in fact, to resist the imposition of such laws.

As I said in my earlier testimony, discrimination against non-residents was a common phenomenon in early American law, and, as a consequence, someone who is taking into account the Indian interest in drafting the 1837 treaty would have every reason to be concerned that subsequently a law would be passed which would exclude, in this case the Mille Lacs, from hunting and fishing.

And if you explain to me the hypothetical that ten years later a law is passed by the Territory, or 20 years later a law is passed by the State, the impact of which is to completely deny the Mille Lacs the privilege of hunting and fishing, my response would be, that's the very sort of law for which this treaty privilege was created to combat.

Q. Well, let's focus on that, then. Could the Territorial Legislature have passed a trespass law that said all open and unclaimed and unfenced and unposted lands shall not be entered [VI-772] by any non-citizen of the United States of America?

A. As I believe I explained at the end of our discussion this morning, I think the question of the future state of trespass law is a difficult question for a judicial analysis on the basis of whether this treaty privilege, treaty privilege, whether this treaty privilege would prevail over certain inconsistent state or territorial legislation.

Q. Well, your report does establish that state trespass law applies and controls over the provisions of the 1837 treaty, is that correct?

A. I describe what state trespass law is in 1837, and I say that this is part of the basis for the privilege which Article V creates. It's created against the background of state trespass law. In other words, you could ask, what is the value of the privilege which Article V creates when, in fact, the Indians have ceded all the land? That's from 1855.

But let's take 1837. What is the value of the 1837 privilege when the Indians have ceded ten-million acres of land?

And my response is, under the territorial trespass law of 1837, even though you no longer own the ten-million acres of land, you have every reason to believe that the fact that you no longer own the land will have virtually no impact on your ability to hunt and fish on the land, because you know, on the basis of the territorial law of 1837, there's no reason to own [VI-773] land, because the whole purpose of early American law was to make access to wilderness areas completely free even though you are not the owner of the particular land.

Q. But the United States became the owner of the land following the 1837 treaty, correct?

A. Yes.

Q. And so the United States could have simply closed all of the areas in the 1837 treaty to Indian access as the landowner?

A. Yes, I believe the United States could have erected a fence around ten-million acres of land, could have put up signs that said, "Posted; No Hunting." And on that basis I believe that no one would be free to hunt or fish on the land.

But I also believe that anybody who was in the position of negotiating with regard to these interests would conclude that there was no realistic threat that the land would subsequently be enclosed and posted, and so that the rights, the privileges, of hunting and fishing would be useless.

Q. In terms of posting, what you're doing with posting is, you're giving notice that the land is closed to your proposed activity. Is that a fair statement?

A. Yes, although posting has to be carried out in certain ways.

Q. Well, isn't it the equivalent of posting to issue an order from the President of the United States in 1850 revoking [VI-774] the privileges of hunting and fishing in the ceded territory?

A. I don't believe that that satisfies the applicable territorial law with regard to posting. I think posting not only serves to warn people that you're not allowed to go

into the area; posting also serves to identify the area which you're not allowed to go into.

And posting further demonstrates that you have, in fact, taken steps to assert control, development, over the particular land. And although you may hypothesize that the United States would be in a position to post 10-million acres of land, I don't believe that an edict that the land is posted would, in fact, satisfy the requirements for posting as those requirements existed in early American law.

Q. It's your position, then, Dr. Lund, that the powers of the President of the United States were circumscribed by the state territorial trespass laws?

A. It's my position that, in fact, if the United States were to change the law so that a simple statement by the President that ten-million acres of land were no longer open to fishing and hunting because they were, quote, posted, it's my position that such an attempt to innovate a legal doctrine would conflict – although I'm touching on treaty law here – would conflict with the privilege which was retained by the Indians in Article V.

Q. I want to make sure that I understand this point [VI-775] correctly. Is it your position that Article V gave the Mille Lacs Band no possessory rights in or to the land ceded in the 1837 territory?

A. Yes, that is true. I don't believe that Article V gives them an ownership interest in the land.

Q. I'm talking about a possessory interest, whether or not that becomes an ownership interest in land. I'm talking about a possessory interest in the land.

A. To speak as precisely as I can, I don't believe that entry into unenclosed, unfenced, unposted land is an assertion of a possessory interest. And, as I stated in my direct testimony, there are a lot of cases to establish it's not an assertion of a possessory interest. And, on that basis, I'd say that, no, this is not a possessory interest.

Q. Is constructing villages and residing there with gardens some indication of a possessory interest in land?

A. I don't see that has anything to do with wildlife law, sir. I don't know anything about constructing villages and gardens and residing.

Q. Well, isn't it true that that's how the Mille Lacs Band lived in order to carry out their hunting and fishing privileges, was by having encampments on the south shore of Lake Mille Lacs?

A. I'm not an ethnohistorian. And, as I said, I addressed this from the plain meaning of the language of the treaty.

[VI-776] Q. Now, you indicate in your report that the 1837 privilege was an interest unknown to the common law. Do you recall that statement in your report?

A. Yes, I do.

Q. Now, we know you didn't draw that from any contemporaneous source in connection with the 1837 negotiations. Is that fair to say?

A. Certainly not from the negotiations. I drew it from the context of the laws that existed in 1837.

Q. You're not aware of any communication to the President, Congress, War Department, or Attorney General, notifying them that what was being created in this treaty was something unknown to the common law, are you, sir?

A. That is correct, I am not aware of such an instrument.

Q. In fact, before you reached that conclusion, there was no writing or document anywhere indicating that this privilege was a right or an interest unknown to the common law?

A. To my knowledge, no scholar in the first half of the 19th century undertook to analyze whether the privilege which is granted by Article V was an interest which was unknown to the common law.

Q. Would you agree with me that precedent was very important in the 19th century legal analysis?

A. Certainly.

Q. Would the drafters of the 1837 treaty language in Article [VI-777] V have understood that the privilege to hunt, fish, and gather would give the Band the rights to hunt, fish, and gather the same as those available to white settlers?

A. You're asking me whether the privilege in the treaty is different from the privilege which white people had, and, again, I believe that's a question of treaty law.

If, on the basis of my analysis, and my analysis is that this, in fact, speaks to the regulatory authority of the state

with regard to the Indians, I do believe that – the regulatory authority of the government or the state; by "state," I mean to identify government – since this speaks to the regulatory authority of the government, yes, this does give the Indians, as I read the plain meaning, it puts the Indians in a different position than the white settlers who have not managed to secure the privilege which is described in Article V.

Q. So it gave the Indians greater privileges than the white settlers?

A. Yes, that's true.

Q. And that was the intent that you glean for the drafters of the '37 treaty, is that right?

A. There's a doctrine in 19th century law which says that an interpretation which provides meaning to a provision in a contract or agreement is to be preferred to an interpretation which makes that provision meaningless.

[VI-778] Now, if, as you suggest, Article V does nothing but puts the Indians in exactly the same position as anybody else, then Article V does nothing at all. I don't think that that interpretation is to be preferred. I think that all the relevant canons of construction from the 19th century indicated that a preferable interpretation is to provide some meaning to Article V.

Q. Well, let's talk about that, then. First of all, Article V doesn't talk about the rights of Indians as individuals, does it?

A. It speaks of the Indians.

Q. But it's a privilege granted to the Band, not to the Indians who were alive at that time, isn't it?

A. That's Indian law, but I'm willing to concede that it is a privilege granted to the Band.

Q. And isn't it also true that none of the Indians were citizens of the United States at that point in time?

A. That really is stepping outside of my general knowledge, although I do believe that's true.

Q. And wouldn't it be consistent with an interpretation of Article V that, by putting non-citizens on equal status with citizens with regard to hunting and fishing rights, would be giving them something that they wouldn't have without it?

A. Not necessarily. It depends upon what the law is with regard to citizens and non-citizens.

[VI-779] Q. But it would provide a protection for the non-citizens, wouldn't it?

A. If, in fact, you mean to imply that the only purpose of this provision was to address the regulatory authority of the state, as has been exercised with regard to discrimination against non-residents, I believe that such a narrow interpretation of the privilege has no basis in the language of Article V.

Q. My question was – and if you could give me a direct answer, it will be appreciated – isn't the granting of privileges of hunting and fishing to non-citizens equal to those of the citizens of the United States granting them something under Article V that they wouldn't have without it?

A. That would grant them something, if it's true they wouldn't have it without it.

Q. Certainly no one claims that the government of France can come in and hunt and fish in the area of the Louisiana purchase, do they?

A. I don't believe so.

Q. Does the privilege in Article V grant commercial rights to hunt and fish?

A. That's an area outside my expertise, because it's addressing whether the treaty involves commercial rights or not.

Q. Based on your expertise in wildlife law, is there a

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[VI-789] general views.

I feel competent to address his position as an authority in American law and his position as an authority in English law, but I don't feel competent to address his views in general. As you know, he summarized all of the English common law in a four-volume work of some magnificence, and I did not prepare to address all of his views for this trial.

Q. Blackstone's view was that the sovereign owned the title to fish and game, is that true?

A. That is true.

Q. The view in the United States was that the government owns the title to fish and game in trust for the benefit of all of its citizens, is that true?

A. That is the view, as announced in *State v. Rodman* from 1896, in Minnesota.

Q. It's an important distinction, holding the interest in trust rather than simply owning title itself in the sovereign. Would you agree with that importance?

A. I would, yes. sir.

Q. In fact, it's that ability to own fish and game in trust for the benefit that gives the room for the state to regulate the activities of hunting and fishing by landowners under a number of decisions. Do you agree with that?

A. I don't think that the description of owning it in trust is necessary to establish the regulatory authority. I think [VI-790] the regulatory authority flows from the police power.

And the analysis is not absolutely necessary, but I do agree with you that the general tenor of the decisions is that the regulatory authority flows not from the proprietary interests which the King might have, based upon some of Blackstone's view, but rather from the interests which the King had as sovereign, and that the states of the United States, and in certain respects the federal government in non-state areas, succeeded to that regulatory authority which the King had as sovereign.

Q. You have declined, Dr. Lund, to address the issue of whether or not the privilege was permanent or revocable, indicating that that is an issue under treaty law, based on the interpretation of the phrase "during the pleasure of the President of the United States."

But isn't the issue of permanency and revocability important to determining the nature of the privilege as to whether it's a license or an interest in land?

A. No, I don't think it's important to determining the issue of whether it's a license or an interest in land, because, whether it's permanent or revocable, it's still not an interest in land

Q. One of the important interests in land is a right of quiet enjoyment. Would you agree with me?

A. Speaking in vague generalities? I'm willing to accede to

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[VI-799] reason that access is granted impact the right to hunt and fish while on the property?

A. I'll give you an example.

Q. Well, –

A. I'll give you an example why I believe the reasons for access in a certain context would impact the privilege of hunting and fishing.

Q. Dr. Lund, we seem to be having a problem, which is, I'd like you to answer the questions I'm asking. And if you could do so directly, it would save a lot of time for all of us. Now, my question was, do the rights of access, the reason for access, impact the ability to hunt and fish?

A. In certain context it might.

Q. And what might those contexts be?

A. Let's say I go on your property for the purpose of stealing some of your chattels which have been on the property, and while I'm there, I decide to kill a deer which is on your land. It might be that I have become a trespasser when I go on your property for the purpose of stealing the chattels which you've left on your property. And, for that reason, I would be subject to a trespass action even though, had I only gone on the property for the purpose of killing a deer, I would not have been a trespasser.

Q. So if the access is lawful, then there is no ability to restrict hunting and fishing privileges while on the property?

[VI-800] A. You can restrict it by taking the appropriate steps under state or territorial trespass law.

Q. But that would be the only way?

A. The appropriate steps are the only appropriate steps, I agree.

Q. And the appropriate steps, and the only steps, are fencing and posting?

A. Fencing, posting, or, depending upon the jurisdiction, acting in a manner consistent with the common law of enclosure.

Q. And what would "acting in a manner consistent with the common law of enclosure" mean with regard to the ceded territory in the state of Minnesota?

A. Although I've given you a careful description of the 1838 Wisconsin fencing law, I am not capable of giving you as careful a description of the Minnesota

fencing law. It is my belief, under the doctrines of the Minnesota territorial reception of the Wisconsin territorial law, that at a period prior to 1855, the Wisconsin fence law was, in fact, the territorial law of the Minnesota Territory.

Thereafter, Minnesota enacted another fence law. I have not been able to locate the fence law which Minnesota enacted, so I'm not completely confident as to whether the Minnesota fence law in 1855 was simply the Wisconsin 1838 territorial fence law, under the doctrines of Minnesota Territorial

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[VII-869] All this case says is that a state can pass a rule which – a state cannot pass a rule which prevents a nonresident from taking fish and game if a resident is allowed to take fish and game on his land. That's the only issue which this case addresses. But what this case does is, it refers to Christian's views, but it hardly represents anything more than a blip in the various cases about this problem.

Q. Are you telling this Court that the doctrine in Minnesota was not that the landowner had the right to take the game on his own land?

A. Yes, I'm telling the Court that the power with regard to the taking of fish and game is a power which inheres in the sovereign state of Minnesota. It isn't in the landowner.

Q. You have in front of you the case of *Hanson versus Fergus Falls National Bank,* sir?

A. Yes, sir.

Q. This was a case in which an individual – we'll avoid all of the foreclosure technicalities that occurred – but, in any event, a bank ended up with a hunting right on the land, and then there was a claim that this banking entity could not hold such a right and that the right could not be passed on. Is that a fair statement of the case?

A. I'm not intimately familiar with this case, sir.

Q. All right. You have had an opportunity to review the

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McClurken Cross (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[VIII-987] Afternoon Session
June 22, 1994
1:20 o'clock p.m.

(Appearances as heretofore noted.)

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JAMES McCLURKEN,

resumed the witness stand and testified further as follows:

BY MR. JOHNSON:

Q. I believe where we left off just before lunch we were talking about petitions, numerous petitions, I think you said that the Mille Lacs Chippewa sent to the President of the U.S. over the years. And the years I'm focusing on are '55 through the end of the 19th century, perhaps.

A. Yes.

Q. And you weren't able to give me a figure, but lots?

A. There were lots.

Q. You have cited a few of them in your report, have you not?

A. I have.

Q. I had asked you about two exhibits just before we broke. There were two newspaper accounts of exhibits. I

believe you said 11 you had not seen before, and you were still looking at 22 when we broke?

A. Eleven I could not recall seeing before. And 22 I said that I had seen before.

Q. In all of these which you have seen, did any of them [VIII-988] reference the 1837 treaty or its provision of hunting and fishing privileges?

A. In the petitions, Indiana generally do not state which treaty they're speaking of.

Q. Could you just give me a yes or no? Do any of the petitions expressly cite the 1837 treaty?

A. They do not use language that refers directly back to the 1837 treaty.

Q. I'll come back to this question in a moment. Let's move through the exhibits first. Exhibit 26 is a fairly explicit account. For your and my ease of reference, Dr. McClurken, the LFT, I believe, in the right-hand column tells you what paper this is.

A. Okay. Can you tell me the number of the exhibit again?

Q. Yes. I'm at County 26, the long article.

A. Yes.

Q. And I would just, for your and the Court's benefit, I believe the LFT lets us know, since the newspaper itself has been cut off at the top, that that's also the Little Falls Transcript.

A. Yes.

Q. And the date following is the date of the paper.

A. Okay.

Q. And you'll just have to take my word for it at this point. But that's what is intended here, so it will help you

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

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[IX-1097] MR. ARUM: No, Your Honor.

THE COURT: You're excused, Dr. McClurken.

(Witness excused)

THE COURT: Mr. Slonim?

MR. SLONIM: Your Honor, we will need, apparently, at some point to recall Professor Cleland and Dr. White to deal with some additional documents. We're not quite prepared to do that right now, so I'd like to proceed with the other witnesses at this point.

THE COURT: All right.

MR. SLONIM: We call Herman Kegg.

HERMAN KEGG,

called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SLONIM:

Q. Mr. Kegg, how old are you?

A. Sixty-seven.

Q. Where were you born?

A. Princeton, Minnesota.

Q. And where have you lived during the course of your life?

A. Mille Lacs Lake.

Q. What part of the lake?

[IX-1098] A. West side.

Q. What is your mother's name, Mr. Kegg?

A. Mart Kegg.

Q. And where did she live during her life?

A. Leech Lake, I believe.

Q. And about how old was she when she – did she move to Mille Lacs at some point?

A. Yes, but I don't remember.

Q. How old is she now?

A. Ninety-five.

Q. And did she live most of her life at Mille Lacs?

A. Yes.

Q. Is she a member of the Mille Lacs Band?

A. Yes.

Q. Do you know who Harry Ayer was?

A. Yes. He ran the trading post.

Q. Where was the trading post?

A. Right on our reservation on the west side of Mille Lacs.

Q. Did your mother work for Harry Ayer?

A. Yes, she did.

Q. What did she do for him?

A. She sold things.

Q. What kinds of things did she sell?

A. Oh, just about everything, like beaded stuff and baskets and moccasins and on down.

[IX-1099] Q. Where did she get those things from?

A. A lot of them were made by the Indians on the reservation.

Q. What were they made out of?

A. Birch bark and – moccasins out of deer skins.

Q. What was your father's name, Mr. Kegg?

A. Martin Kegg.

Q. And where did he live his life?

A. He lived mostly in Mille Lacs.

Q. Do you know when he was born?

A. No, I don't.

Q. Do you know whether he was born before 1900?

A. I don't remember.

Q. Was he a member of the Mille Lacs Band?

A. Yes, he was.

Q. And did he live at Mille Lacs most of his life?

A. Yes.

Q. Do you know where his parents were from?

A. No, I don't remember.

Q. Do you know whether they lived at Mille Lacs?

A. I think they did live at Mille Lacs.

Q. Do you know what kind of home they lived in?

A. Well, no, I don't really remember, but I've seen pictures.

Q. And what were the pictures of?

[IX-1100] A. More like round huts and stuff.

Q. Do you know what they were made out of?

A. Out of sticks. And then later on they moved to a little shack-like. Today they call them tar paper shacks.

Q. Is there a name for the huts that they lived in?

A. I don't remember what they called them, but they were round.

Q. Are you a member of the Mille Lacs Band?

A. Yes, I am.

Q. Do you have a Chippewa name?

A. Yes, I do.

Q. And what is your Chippewa name?

A. Wagoosh; that's Fox.

Q. Do you speak Chippewa?

A. Yes, I do.

Q. Was Chippewa your first language?

A. Yes.

Q. When did you learn English?

A. When I was about eight, ten years old.

Q. Do other members of the Mille Lacs Band still speak Chippewa?

A. Yes, they do.

Q. About how many?

A. More than half, I believe.

Q. In your generation, was it typical for Chippewa to be the [IX-1101] first language?

A. No, it wasn't. We spoke Chippewa all the time.

Q. How many brothers and sisters do you have, Mr. Kegg?

A. I believe there's seven of us.

Q. And how many children do you have?

A. Me?

Q. Yes.

A. Two – three.

Q. And how many grand children?

A. I have – they're kind of hard to count – about eight or nine, maybe ten.

Q. Have you been a hunter during your life, Mr. Kegg?

A. Yes.

Q. Who taught you how to hunt?

A. My father.

Q. How did he teach you?

A. Just any way, like mostly – it's pretty hard to say, mostly sneaking around.

Q. Have you hunted for deer?

A. Yes.

Q. And what did you do with the deer that you hunted?

A. Oh, we ate the deer, and we used just about every part of it.

Q. What did you do with the bones?

A. Well, some of them, I don't know, but I've seen some of [IX-1102] them that's been made out of stuff. But I don't remember what we did with them.

Q. How about, did you ever use the teeth from the deer?

A. Oh, yes.

Q. What did you use them for?

A. Well, for designs or necklaces or –

Q. How about the hooves of the deer? Did you use that?

A. Yes, they used them, too.

Q. What did they use them for?

A. I don't really remember – necklaces. They had ways of using them.

Q. When you harvested deer, did you ever share the deer with other people?

A. Oh, yes.

Q. And did you ever get anything in return? Did other people share things with you?

A. Well, yes, um-hmm.

Q. Did you consider hunting to be a sport, or was it more like work?

A. It's for survival mostly.

Q. Were you considered a good hunter?

A. Well, I wouldn't say good, but average.

Q. And did people respect hunters?

A. Oh, yes, they did.

Q. Are deer ever used in Chippewa ceremonies?

[IX-1103] A. Oh, yes.

Q. Can you give me any examples of that?

A. Well, like if there's a piece of meat they use to eat, it has to be fresh.

Q. Does the deer meat have to be fresh for other kinds of ceremonies?

A. Yes.

Q. Can you tell me some of the other animals that you either hunted or trapped?

A. Well, I trapped mink and raccoon to eat, beaver.

Q. Did you ever trap or snare wolves?

A. Oh, yes.

Q. Did you ever sell furs?

A. Oh, yes.

Q. You mentioned raccoons and mink and beaver. How about muskrats?

A. Yes.

Q. And how about duck hunting? Did you ever do any duck hunting?

A. Yes, quite often.

Q. And how about partridge?

A. Yes.

Q. Were there any special uses of partridge? How were they used?

A. Oh, yes. There's a bag there that you blow up and dry [IX-1104] up, and that's for babies to play with.

Q. How about the tail feathers from the partridge? Was there any use for them?

A. Yes. They still use that today for like fanning the air.

Q. And I think you said your dad was also a hunter?

A. Oh, yes.

Q. How about your grandfather?

A. I don't remember.

Q. Did your dad do any trapping?

A. Yes.

Q. What kind of animals did he trap?

A. Well, muskrat, mink, snared wolf.

Q. And did he sell furs?

A. Yes.

Q. How about the hides from the deer? Did he sell those?

A. Yes.

Q. Have you ever done any fishing, Mr. Kegg?

A. Oh, yes.

Q. What kinds of methods have you used to fish?

A. Mostly hooks.

Q. Did you ever do any spearing?

A. Yes.

Q. Was that a traditional way of taking fish?

A. Oh, yes.

Q. And what kind of fish did you spear?

[IX-1105] A. Northerns mostly.

Q. Any others?

A. No, not really, just mostly northerns.

Q. Did you ever have a problem with the State in terms of spearing fish?

A. Oh, yes.

Q. Can you describe that for the Court?

A. Well, they closed the treaty rights, and at the time I didn't know, and they walked up to – we called it a little tepee, and I had a northern, so – and I did 60 days in Wayzata for that.

Q. Was the little tepee something you had out on the ice on the lake?

A. Yes.

Q. And what was it made out of?

A. Little sticks or blankets.

Q. And, as far as you know, does the State still prevent spearing?

A. They don't spear any more.

Q. Are fish also used in Chippewa ceremonies.

A. Oh, yes.

Q. Can you give me an example of that?

A. Well, just about anything like – let's see, if you give a namesake to anybody, you use fish. And then you have feasts.

[IX-1106] Q. Do the fish have to be fresh?

A. Yes.

Q. Are they also used in burials?

A. Yes.

Q. Was your father a fisherman also?

A. Oh, yes.

Q. And how about, do you know whether your grandparents were fishermen?

A. I don't remember.

Q. Have you ever shared fish with other families or given fish away?

A. Oh, yes.

Q. And did you get things in return? Did others share with you in return?

A. Oh, yes.

Q. Are there any special uses for the bones of the fish?

A. Yes.

Q. Can you describe that?

A. Well, northerns are kind of big, and they use the backbones for rattles and games.

Q. Did your parents or your elders teach you anything about the right way to fish? Did they teach you things about that?

A. Oh, yes.

Q. Can you give me an example of that?

A. Well, like, to start out with, my dad showed me how not [IX-1107] to spear a female. In the springtime you can just see they carry eggs in there. He showed me not to spear a big female. Only at times when they wanted to eat the eggs, and then they speared them.

Q. Was the springtime a traditional time for spearing fish?

A. Well, yes and no, but they speared all the time before the '50s anyway.

Q. Do you know whether the State allows Chippewa to take fish in the spring still?

A. Not today they don't.

Q. Mr. Kegg, how did you make your living?

A. I made my living at – I'm kind of one of them last ones that make my living out of gathering, fishing, and selling bait. I've been a bait dealer all my life.

Q. What kinds of bait did you sell?

A. Live bait for fishing, minnows.

Q. Have you ever gathered wild rice?

A. Oh, yes.

Q. Did your family, or does your family, have a rice camp?

A. Oh, yes.

Q. And is gathering wild rice a family activity?

A. Yes.

Q. And does that continue to this day?

A. Yes.

Q. What do you do with the rice that you gather?

[IX-1108] A. Well, we fixed it and sold whatever we don't keep to eat.

Q. Have you ever made maple sugar?

A. Oh, yes.

Q. Is that also something that's a family activity?

A. Yes.

Q. Does the family have a sugar camp also?

A. Well, not – because we live right close to the maple trees. We used to have caps for – maple camps, we call them.

Q. And what were those?

A. Well, they build what we were talking about, them round wigwams, round. They stayed out by the maple sap.

Q. What would you do with the maple sugar once you made it?

A. Well, me, the way I made it was, I sold to the museum. And I kept a lot of it, what I could eat, and sold it through the winter.

Q. Have you gathered other things besides wild rice.

A. Oh, yes; berries.

Q. How about birch bark?

A. I used to gather birch bark, but that's kind of going out of style a little bit.

Q. What did you do with the berries that you gathered?

A. Oh, we canned them for the winter and stuff.

Q. Did you share them with other families?

A. Oh, yes.

Q. Did you sell some?

[IX-1109] A. Sold some, yeah.

Q. Do the Chippewa people use tobacco as part of hunting and fishing and gathering?

A. Oh, yes.

Q. Could you explain how that's used?

A. When you first go out for your first fish in the spring or in the winter, you put tobacco out when you go out on the lake so you don't dirty the lake or water.

THE COURT: You mean you put the tobacco out, or do you smoke it?

THE WITNESS: We put it out. A lot of them burn it, and some smoke it.

BY MR. SLONIM:

Q. Do you know whether state seasons for hunting restrict the times at which traditional hunts would take place?

A. Say that again, please.

Q. Do you know about state hunting seasons?

A. Oh, yes.

Q. And do they restrict the times of traditional hunts?

A. I don't know how to answer that. When they needed fish for some feast like, they get it – they didn't go by the state. They go by what they call our Indian ways.

Q. And those aren't always the same as the state seasons, are they?

A. No.

[IX-1110] Q. Would you say that hunting, fishing, and gathering is an important part of your way of life?

A. Yes.

Q. And how about your parents and grandparents?

A. Yes.

Q. And do you think it was important to even prior generations?

A. Oh, yes.

Q. What are some of the ways it was important?

A. Well, that you keep and hold to use for yourself, and then you trade things, like when you give somebody something, they give something back to you.

Q. It was a way of getting food?

A. Yes.

Q. It was a way of getting clothing?

A. Oh, yes.

Q. It was a way of getting shelter?

A. Um-hmm.

Q. And was it important in a spiritual way also?

A. Yes. It still is today.

MR. SLONIM: I have no further questions, Your Honor.

THE COURT: Mr. Chaffee, are you going to question?

MR. CHAFFEE: Yes, Your Honor. Your Honor, on the report we gave you as far as who is going to cross, Ms. Fahey

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Kegg Cross (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

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[IX-1116] Q. Mr. Kegg, I believe Mr. Slonim asked you about some of the trapping activities that you did. And I believe you mentioned you trapped rack raccoon, mink and beaver, is that correct?

A. Oh, yes.

Q. And I think you also mentioned that your father would sell the furs and you would sell the furs, is that correct?

A. Oh, yes.

Q. Did you do any of that selling of furs with a state license?

A. Oh, yes. I had to be pretty careful, because the bait dealing was my life and I had to hang onto my license, because if I did something wrong, I'd lose them. I was lucky. I never lost mine.

Q. I think I recall you mentioning you had to work pretty hard to keep The State was pretty harsh if you violated anything, is that correct?

A. Um-hmm.

Q. Mr. Kegg, are you speaking here today as an elder of the Band?

A. Well, yes.

Q. Now, when you describe your hunting, fishing, and gathering activities that you conduct, are you also describing what Band members would do?

A. Oh, yes.

[IX-1117] Q. Mr. Kegg, I think you also discussed some of your spearing activities?

A. Oh, yes.

Q. And you participated in those under state license?

A. Oh, yes. Mille Lacs Lake, they used to spear all the time.

Q. Now, when you would spear, would you – if I recall correctly, you spear on the ice? You cut holes in the ice and you'd spear with temporary tepees?

A. Um-hmm.

Q. What kind of fishing did you normally spear?

A. Northerns, mostly.

Q. And you would do that for both ceremonial purposes and to eat?

A. Yes.

Q. Mr. Kegg, I think you also mentioned the Indian way, and I believe you discussed sharing. As you may recall, you and I talked about that quite a bit at your deposition. Under the Indian way, is commercialization part of it?

A. We never agreed with commercialization.

Q. Commercialization is not part of the Indian way?

A. That's not part of Indian way.

Q. And in your netting activities of fish, did you net tullibees?

A. Oh, yes.

• • •

[IX-1122] Q. When you did your spearing for northerns in the winter in the tepees, you never sold what you speared, did you, sir?

A. No.

Q. Because that would have been contrary to Indian ways?

A. Yes.

Q. Not only were you arrested that one time when you were spearing through the ice – and I think you told me that was when you didn't know that they had closed the lake, is that true? –

A. That's true.

Q. – your dad, and you said about 15 or 20 others, were arrested s netime shortly after World War II, maybe in the early '50s or something, for netting? Wasn't that the charge?

A. Yes, netting.

Q. Did you know a Band member by the name of Joe Benjamin?

A. Oh, yes. He was my hunting partner.

Q. Oh, is that right?

A. Yes.

Q. How about a John Davis? Did you know John Davis?

A. Oh, yes, I know John Davis.

Q. Was he a Mille Lacs Band member?

A. Yes, he was.

Q. How about Jim Martin? Was he a Band member?

A. Who?

Q. Jim Martin. Did you know Jim Martin? You might not know

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

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[IX-1124] BRENDA BOYD,

called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SLONIM:

Q. Ms. Boyd, are you a member of the Mille Lacs Band?

A. Yes, I am.

Q. Where are you employed?

A. I'm employed with the Mille Lacs Band of Chippewa Indians.

Q. What positions do you hold with the Band?

A. I'm director of tribal operations.

Q. And are you here today as a spokesperson for the Band?

A. No. I'm here representing myself and my family.

Q. Where do you live?

A. I live in Isle.

Q. And where is that?

A. That's on the southeast shore of Mille Lacs Lake.

Q. And how long have you lived there?

A. I've lived there all my life, with the exception of two years I spent in Alaska.

Q. And do you have an extended family in that area?

A. Yes, I do.

Q. And are there other Mille Lacs families, Mille Lacs Chippewa families, in that area?

[IX-1125] A. Yes, there is.

Q. Do you know how many generations have been living in that area?

A. Of my family?

Q. Yes.

A. As far as I can count, it would be five generations.

Q. And do you know if that's true of some of the other families in the area?

A. Yes.

Q. Were both of your parents Chippewa?

A. Yes, they were.

Q. What language did they speak?

A. They spoke Chippewa and English.

Q. Do you know whether – let me ask you, where was your father born?

A. My father was born up in Jack's Twin Bay area.

Q. And where did he live during his life?

A. In the Isle area.

Q. Do you know when he was born?

A. May 19, 1903.

Q. And were his parents both Chippewas?

A. Yes, they were.

Q. Where were they from?

A. I believe my grandfather was from the Snake River Band, and then my grandmother was from the Mille Lacs Band.

[IX-1126] Q. When was your mother born?

A. December 1, 1910.

Q. And where was she from?

A. She was from the Wahkon area.

Q. And where is that?

A. That's about three miles from Isle along the southeast shore of Mille Lacs.

Q. Were her parents both Chippewa?

A. Yes, they were.

Q. And where were they from?

A. Both from the Mille Lacs area.

Q. Can you describe for the Court, to your knowledge, how your grandparents made their living?

A. My grandparents – they lived primarily off the land. I believe they did some work for some of the farmers or some of the loggers in the area.

Q. Did they have different seasonal activities?

A. Yes, they did.

Q. And could you describe some of those?

A. In the spring, they would have the maple sugar camps; in the summer, they would have the gardening. And in the fall they would have the rice camps and then the hunting camps. And then they would be back in their own area for the winter.

Q. Do you know whether your grandmother on your mother's side, did she ever make and sell natural products?

[IX-1127] A. She made birch bark baskets and canoes, wastepaper basket types, all from birch bark, willow and basswood

Q. Did you ever see the sugar camps that your parents and grandparents used?

A. I helped out in the sugar camp that we had.

Q. And can you describe what the camp was like?

A. Well, it was situated right in the center of a group of maple trees. And we had like two or three kettles going at one time – or not kettles, containers

going. One was probably the large kettle where we boiled the syrup.

Q. What kinds of containers and kettles did you use?

A. We had a cast iron kettle, and then they also used like big metal pails to boil it in, boil the sap in.

Q. Did you use anything else?

A. To cook the syrup?

Q. Um-hmm, or to collect the sap.

A. To collect it, they had containers, whatever they could use, like coffee cans. At one time they used to have the little pails that contained honey, and we used those for collecting sap. We used a number of items to collect sap in.

Q. Did you have any birch bark containers?

A. I don't remember seeing any, but I imagine they did use them.

Q. Can you describe the rice camps that you saw for me as well?

[IX-1128] A. The one camp that I went to was up in the Lake Minnewawa area. And there they had a number of families that lived in the area.

Q. And what was the camp like? What kinds of dwellings did they have.

A. What kind of what?

Q. Where did they live? What kind of dwellings were there?

A. Some of them lived in wigwams; some of them lived in canvas tents.

Q. And were the activities of the rice camp, were they conducted as family activities?

A. Yes, they were.

Q. And what did you do with the rice once it was harvested?

A. They took it home and they dried it and finished it.

Q. Then what did they do with it?

A. The majority of it was stored. The first harvest that we had, we usually set a dish and burned tobacco.

Q. Did you exchange any of the rice with other families?

A. With other family members or extended family?

Q. Yes.

A. We shared the rice with the family members who didn't go out.

Q. If you had surplus, did you ever sell any of the rice?

A. I think that some of it was sold.

Q. Did your own parents also follow a seasonal round in [IX-1129] their lives?

A. Yes, they did.

Q. And what were some of the activities that they engaged in?

A. In hunting, fishing, maple syrup, berry-picking also.

Q. Did they do any trapping?

A. My father trapped.

Q. How did your father learn to hunt and fish and trap?

A. He learned it from his great-grandfather.

Q. And what was his name?

A. Naguonabe.

Q. Do you know when Naguonabe was born?

A. When he was born?

Q. Yeah. Do you know when he lived?

A. It was in the early 1820s or 1830s when he was born.

Q. Did your father ever write a book about what he learned?

A. Yes, he did.

Q. What was the book called?

A. It was called "Indian Compass."

Q. And can you just give me a brief description of what's in the book?

A. He tells of the methods that was taught to him by his great-grandfather about fishing, hunting, snaring.

Q. And those were things that had been passed down through the generations?

[IX-1130] A. Yes.

Q. Can you tell me some of the animals that your father hunted and trapped?

A. He trapped wolf, beaver, mink, weasel, muskrat.

Q. Did he hunt for deer?

A. Yes, he did.

Q. Do you know where your father hunted?

A. In the area called the Jones farm, and that's like about five miles north of Woodland. And Woodland is about 15 miles north of Mora.

Q. Is that in the Snake River area?

A. Yes, it is.

Q. What did your father do with the furs that he trapped?

A. He sold them.

Q. Did he ever have occasion to sell furs to raise money for some emergencies?

A. My mother had an enormous hospital bill and doctor bill that he had to pay off, because it wasn't covered under Indian health.

Q. And what did he do to pay off that bill?

A. He trapped. The animals that he trapped, he sold the furs to raise money.

Q. What did he do with the deer hides from the deer that he took? Did he ever sell those?

A. I believe he sold those, too.

[IX-1131] Q. Was your father also a fisherman?

A. Yes, he was.

Q. And what were some of the fishing species that he fished for?

A. Northern, walleye, sunnies, crappies, tullibees, suckers. I'm running out of fish here.

Q. Just about everything that was available?

A. Yes. Bullheads.

Q. Did your father spear for fish?

A. He told me the old Indian method where they took a temporary shelter out on the lake and did what you call dark-house spearing. But the temporary shelter, he would take it off when he was done spearing.

Q. And do you know what the shelter was made out of?

A. I believe he said it was like made out of willows, tied together with basswood twine, and then covered with a blanket or a hide to keep out the light.

Q. Did your parents gather other kinds of resources apart from fish and game?

A. We picked berries.

Q. Anything else? Any other kinds of plants or roots?

A. My mother gathered some roots for medicinal purposes.

Q. And how about bark?

A. My mother and I gathered birch bark.

Q. What were some of the roots that were gathered for [IX-1132] medicinal purposes?

A. The kind you call namapen (phonetic); I think it's called wild ginger root. I helped her gather that. And then there was another type that we had to go to a swampy area to gather, and she told me that the plant whose root goes east was the plant that we were supposed to take.

Q. And that was also for medicinal purposes?

A. Yes, it was.

Q. Did you gather or have a use for basswood twine?

A. Yes. That's what we used to tie some of the willow together so we could make a shelter.

Q. Are there any other plants that come to mind in terms of things that you would gather?

A. Butternuts, berries, wild grapes.

Q. Were these natural resources that your family gathered, were they ever used in any kind of trade?

A. Surplus. What we gathered was used for trade to other individuals. If they had a surplus of something that we didn't have, then we would trade.

Q. Can you give me an example of that? Did you ever trade fish for something?

A. I believe they shared their fish with the extended family, and then probably traded the fish for like maybe some cloth or blankets.

Q. And how about some of the berries? Were the berries ever [IX-1133] used in any kind of trade situation?

A. We canned most of our berries, the blueberries and the raspberries that we picked. And then later on my father had raspberry plants where we picked the berries and we sold them.

But that was like to non-Indians. Some came to pick the berries, and they got theirs at a lesser rate than if we had picked the berries and sold it to them.

Q. Were there ceremonies that were associated with the use of natural resources?

A. Yes.

Q. One of them, I think you mentioned setting out a dish before?

A. Yes.

Q. Could you explain what that involved?

A. When we have a harvest of like rice, the first harvest, we usually set a dish and put out tobacco.

Q. And why is that done?

A. To give thanks to the Great Spirit.

Q. Are fresh fish or fresh deer meat important for some ceremonies?

A. Yes, they are.

Q. What are some of the ceremonies that they're used in?

A. Funerals; child-naming ceremonies; the first harvest of the season.

Q. And do the fish and deer meat have to be fresh for those [IX-1134] ceremonies?

A. Yes, they do.

Q. Do you, yourself, hunt or fish?

A. I do both.

Q. And how did you learn to hunt?

A. My father taught me.

Q. Did you have any other teachers that taught you about hunting and fishing?

A. My uncles. One of them is sitting here now.

Q. And how about others in your extended family?

A. My grandmother, my mother, my older brothers and sisters, my ancestors. It was passed on from one generation to the next.

Q. Where do you go to hunt deer now?

A. I hunt in Wisconsin.

Q. Why don't you hunt in Minnesota?

A. We have a longer season in Wisconsin, and we can get more deer in Wisconsin.

Q. Is that a season established by the Great Lakes Indian Fish and Wildlife Commission?

A. Yes, it is.

Q. How many deer did you harvest in 1993?

A. Seven.

Q. Did your son harvest any deer?

A. Yes, he did.

[IX-1135] Q. How many did he harvest?

A. One.

Q. And what did you do with the deer that you harvested?

A. The first two that I shot, I set a dish with the first deer that I shot. I think they call it the brisket. And I processed those two deer. And the other five I took to elderly members in the community that had asked for deer meat, and I accepted things in return.

Q. What kinds of things did you accept in return?

A. The majority of it was fried bread.

Q. Have you hunted for any other animals besides deer?

A. When I was younger, we tried our hand at hunting mink, but we weren't too successful. We've hunted gray squirrel; we've shot woodchuck. We got a raccoon one time; porcupine – primarily gray squirrel.

Q. And have you also done some fishing?

A. Yes, I have.

Q. And does your son still fish?

A. Yes, he does.

Q. How are the fish used?

A. We consume the majority of it.

Q. By "we," is that your extended family?

A. Yes.

Q. Do you think that having access to natural resources is important to your family and your family's way of life?

[IX-1136] A. Yes, it is.

Q. In what ways is it important?

A. We need the meat for survival. The deer meat that we get is better for us than the meat you can buy across the meat counter in a store. The fish is probably fresher than the fish that you can see in the store.

Q. Do you think it's important in a cultural way?

A. Yes, it is.

Q. And do you think this was important to your parents' generation?

A. It was very important.

Q. And how about generations before that?

A. Yes.

MR. SLONIM: I have no further questions, Your Honor.

THE COURT: Mr. Chaffee?

CROSS-EXAMINATION

BY MR. CHAFFEE:

Q. Good morning, Ms. Boyd.

A. Good morning.

Q. It's nice to see you again. I believe that you stated that you were director of tribal operations, is that correct?

A. Yes, I am.

Q. You had mentioned to Mr. Slonim that your grandparents

* * *

Boyd Cross (Excerpts)

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FOURTH DIVISION

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[IX-1138] A. Yes, he did.

Q. In fact, I believe you mentioned that your family, your father, your mother, yourself, everyone always bought state licenses to hunt and fish, is that true?

A. Yes.

Q. Does the Mille Lacs Band Department of Natural Resources issue special permits to take deer and fish all year round for ceremonial purposes?

A. For ceremonial purposes, yes.

Q. And that's on the reservation?

A. Yes.

Q. Ms. Boyd, up until the time that you began to go to Wisconsin to hunt deer, you hunted under the state seasons in Minnesota, didn't you?

A. Yes, I did.

Q. Is that also true of small game?

A. Yes.

Q. To the best of your knowledge, is the Band's tradition of hunting, fishing, and gathering on the same model as your family traditions?

A. The general scope, yes.

Q. Ms. Boyd, as part of your duties as director of tribal operations, are you also the director of an oral history project?

A. Yes, I am.

[IX-1139] Q. I believe you told me that you had contributed a document to Roger and Priscilla Buffalohead's book "Against the Tide of American History," is that correct?

A. A document?

Q. I believe you said it was an 1863 Congressional hearing that you contributed to the book, and it's now printed in the book, is that correct?

A. It referred to the treaty of 1863, but I think it was a record in 1897. And it was in my father's possession. It was handed down to him from his great-grandfather Naguonabe.

Q. Ms. Boyd, in our discussion of that book, I believe you said that you believe that that book is an accurate depiction of the Mille Lacs Band history, is that correct?

A. Which book is that?

Q. That's Roger and Priscilla Buffalohead's book.

MR. SLONIM: I'm going to object, Your Honor; lack of foundation.

THE COURT: Well, I'm going to overrule the objection.

BY MR. CHAFFEE:

Q. Did you make that statement, that you believe it is an accurate history of the Mille Lacs Band?

A. Yes.

Q. Did your father or mother ever tell you anything about the 1837 or 1855 treaties?

[IX-1140] MR. SLONIM: Your Honor, I'm going to object to this line of questioning. We had a motion from the Landowners to exclude all testimony about oral traditions about these treaties. There was no comment from anybody.

We acquiesced in that motion and have not offered any testimony. And now it seems that the Counties want to get into the very area to which the Landowners objected.

THE COURT: That appears to be correct, because the parties all had written positions on whether or not these witnesses should be permitted to testify, and the nature of their testimony was set out and discussed.

MR. CHAFFEE: I believe what was agreed to was that they would talk about their own hunting and fishing activities and what the prior generations had done. And I guess I was just asking to see if that was part of their activities.

THE COURT: Well, I believe that the treaties themselves, that's beyond the scope of these witnesses, testimony.

MR. CHAFFEE: Okay. Thank you, Your Honor.

BY MR. CHAFFEE:

Q. Ms. Boyd, how many Band employees are there?

A. Band employees?

MR. SLONIM: Objection; relevance.

MR. CHAFFEE: She said she was director of tribal operations. I was just curious how many Band employees there [IX-1141] were.

THE COURT: Well, I take it we're not going to go into details about the operations of the Band, and so on. But I'll overrule the objection to this particular question.

THE WITNESS: I have no idea how many Band employees. But I know, in the scope of my job, I only take care of tribal enrollments, relinquishments, and certification of Indian blood.

MR. CHAFFEE: Thank you, Ms. Boyd. No further questions, Your Honor.

THE COURT: Mr. Thompson?

MR. THOMPSON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. THOMPSON:

Q. Good morning, Ms. Boyd.

A. Good morning.

Q. You were trained as a historian, is that right? You have a degree in history from St. Cloud State?

A. Yes, I do.

Q. You indicated that you remember sugar camps. Were those sugar camps on the trust land property that you currently reside on near Isle?

A. I don't reside on trust land. I reside on private land, and I have ever since I was about 13 months old.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

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[IX-1146] JOSEPH DUNKLEY,

called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SLONIM:

Q. Mr. Dunkley, are you a plaintiff in this lawsuit?

A. Yes, I am.

Q. How old are you?

A. I am 31.

Q. Where do you live?

A. I live east of Hinckley about five miles. That's in Pine County.

Q. And how long have you lived there?

A. All of my life.

Q. Are you a member of the Mille Lacs Band of Chippewa Indians?

A. Yes, I am.

Q. Do you have a Chippewa name?

A. Yes, I do.

Q. And what is that?

A. Neshakaiwagabo; Stands Alone.

Q. Do you speak Chippewa?

A. Not fluently.

Q. Are there other Band members who speak Chippewa?

A. Oh, yes.

[IX-1147] Q. Was it common in your parents' generation to speak Chippewa as their first language?

A. Yes.

Q. What are your parents' names?

A. My mother's name is Cecilia Dunkley; my father's name is Eugene Dunkley.

Q. And were they both members of the Mille Lacs Band?

A. Yes, they were.

Q. And when were they born?

A. My father was born on March 27, 1913. My mother was born February 7, 1923.

Q. How many brothers and sisters do you have?

A. I have four brothers and six sisters.

Q. And do you have nieces and nephews?

A. Quite a few of them.

Q. About how large is your extended family?

A. About 25.

Q. Are they all members of the Mille Lacs Band?

A. Yes, they are.

Q. Can you describe for me how your parents lived as you were growing up?

A. When I was growing up?

Q. Yes.

A. My father worked at different reservations in Minnesota, and then later on he worked for the Minnesota Historical [IX-1148] Society. But we still hunted, fished, all through the seasons.

Q. What were some of the other seasonal activities besides hunting and fishing?

A. In the springtime, we'd gather maple syrup. And in the summer, usually around June and July, we started gathering berries.

Q. What were some of the – can you describe the gathering of maple syrup? What did that involve?

A. We have two big cast iron kettles we've had since before I was born. It was usually my mother and father that would stay and tend the kettles.

My brothers and I, we would have to gather the wood and keep the fire going. And we also were the ones who had to run around to the trees and gather the sap and bring it back to the fire.

Q. And was this done as a family activity?

A. Yes, it was.

Q. How about gathering berries in the summer? What were some of the berries that you gathered?

A. Blueberries, raspberries, sometimes gooseberries.

Q. Did you ever gather other kinds of plants?

A. Yes.

Q. What were some of those?

A. Some of the tops from sumac trees. Those were used in [IX-1149] medicine. And there were certain roots and leaf stems. What they were for, I was never told at the time, because all my parents had told me was, when they thought I was old enough, then they would tell me.

Q. Were the gathering activities also done as a family effort?

A. Yes.

Q. Did your family also have a wild rice camp?

A. Before I was born. I can just go by the stories that they told me where they had gone. Some were as far as up toward White Earth. They would just have makeshift lodging as far as what they put together.

Q. And what would they use to put together lodging?

A. Whatever was available that they had.

Q. Was this also a family activity, going to the rice camps and harvesting rice?

A. As far as I know, yes, it was.

Q. And did it occur at other places as well?

A. Oh, yes, there were other places. They would go to Wisconsin sometimes. But as far as where we were located in Pine County, there is also Kettle River which has many slues along the sides of it that contained a lot of rice. So they would just take the canoes down the river.

Q. What would you do with the rice and the sugar and the berries that were gathered?

[IX-1150] A. The maple syrup, a lot we kept. Some of it was sold, like to maybe my father's close friends or something. Otherwise, a lot of that we kept it and used. The berries were canned and stored as best we could to keep them.

The rice, the very first batch we had was always – my father pounded a lot of tradition into us when we were growing up in following the ways that we were taught and that he was taught – the first batch of rice was finished and was used in a feast to give thanks for the harvest of rice. Then these dishes that were set out, they were not only an offering with tobacco; they were also to feed the spirits.

Q. Were the resources that were gathered shared among an extended family?

A. Yes.

Q. And were things exchanged for rice or –

A. Oh, sure, because sometimes we had a little bit more than what we needed. And if one of maybe my

uncle's families or something didn't have enough, we would just give it to them. And maybe they had something more than they needed, and they would exchange it and give it back to us.

Q. Did your mother make any craft items from natural resources?

A. Yes. She made a lot of clothing out of buckskin. She had made elaborate works of beadwork, some of which she would sell, and the birch bark baskets used in the finishing process [IX-1151] of wild rice.

Q. And were those shared or exchanged with others as well?

A. The baskets you'd only – she would trade them off. If someone so desired that that's what they wanted to use, have one like that, yeah.

Q. Did your dad – was he a trapper?

A. Yes, he was.

Q. And what kind of animals did he trap?

A. Beaver, mink, muskrat, wolves, raccoon.

Q. And what did he do with the furs?

A. He skun them and stretched them, and he sold them to the fur buyers.

Q. Was your dad also a hunter?

A. Yes, he was.

Q. And what kind of animals did he hunt?

A. Deer, bear, rabbits, squirrels; birds such as partridge, pheasants, geese and ducks.

Q. And what did he do with the animals he hunted?

A. We ate them.

Q. Were those also shared with the extended family?

A. Yes.

Q. Did he ever talk to you about trading deer meat with non-Indians?

A. He did, yeah, a long time ago. There was a little store that was close by. And he didn't have a direct trade [IX-1152] agreement with them; it was just through generosity. He would take maybe a venison roast or something, because he had found out that they liked to have that in their meals.

So he would take them like a venison roast or some steaks out of there. And maybe sometime later – it was not right away – but sometime later the store owner would give us either flour or shortening or lard.

Q. When you were growing up, how much would you say of your diet was from wild foods?

A. Over fifty percent.

Q. And how much of your diet today would you say is from wild foods?

A. About fifty percent.

Q. How much education do you have, Mr. Dunkley?

A. Tenth grade.

Q. You answered the right way. I meant formal education in the sense that most of us think of it. What kinds of jobs have you had?

A. Oh, all kinds of jobs, ranging from loading rutabagas in the beggie field, which was about 85 cents an hour, to being a security guard in the casino.

Q. Has most of your employment been seasonal in nature?

A. Yes.

Q. Are you, yourself, a hunter?

A. Yes.

[IX-1153] Q. And how did you learn to hunt?

A. Through my father.

Q. How did he teach you?

A. He would take me out and explain about whatever animals we were after, how they moved, where they would be feeding. He showed me how to track them. That was before they were wounded or anything, we'd track them down all the way up to the kill.

Q. How old were you when you first went out with your father for hunting?

A. I was about eight years old, but I didn't get to carry a weapon.

Q. Did he – what did you use for hunting?

A. I used a bow and arrow.

Q. And did your father teach you how to make the bow?

A. Yes.

Q. Did he teach your brothers and sisters how to hunt also?

A. Yes.

Q. And do they still hunt?

A. Not all of them, but most of them do.

Q. What do you hunt for?

A. Mainly whitetail and small game, like rabbits, ducks, geese.

Q. Do you sometimes hunt for your extended family?

A. Yes.

[IX-1154] Q. Do you feel that you're restricted by state seasons or bag limits?

A. Yes.

Q. And could your family use more deer if it weren't for those restrictions?

A. Yes, we could.

Q. Have you ever hunted in Wisconsin?

A. As recently as last year, yes.

Q. And why do you go to Wisconsin to hunt?

A. You can hunt off-reservation over there. It's a longer season. It gives me an opportunity to collect a little bit more meat for the winter.

Q. You mentioned that you hunt ducks and geese?

A. Yes.

Q. What do you use to hunt ducks and geese?

A. My bow and arrow.

Q. Are you successful with that?

A. Quite.

Q. Have you ever done any trapping?

A. Yes.

Q. What kind of animals have you trapped?

A. Mainly muskrat and raccoon.

Q. And what did you do with the furs?

A. We skun them out and sold them to a fur buyer.

Q. Are you also a fisherman?

[IX-1155] A. Not a very good one, but, yes, I am.

Q. How did you learn to fish?

A. Through my father.

Q. And what do you fish for?

A. I mainly fish for catfish.

Q. Anything else?

A. Oh, and walleye.

Q. Where do you fish?

A. In the area lakes and rivers where I'm at.

Q. And what are some of those?

A. The river which we live nearby is Kettle River, and there are area lakes such as Tamarack Lake, Razor Lake, Stevens Lake.

Q. Have you ever had a problem with the State in terms of your fishing?

A. Yes, I did.

Q. And what happened?

A. It was about 1986, and me and members of my family, we were fishing on Tamarack Lake. We were trying to catch some crappies, so we could go home and have supper. And they weren't biting very good.

And I saw the larger game fish were sucking down the surface bugs, so I went and got another rod. And I started kicking around some of the stumps, and I found a beetle, so, I hooked him on. I threw it out there to try and hopefully [IX-1156] catch one of those large game fish.

But the state game warden was watching from the hillside. And he started up his truck, come down the hill, and told me that he had been watching me from up there and asked me if I knew that it was illegal to fish on inland water with two poles. And I told him that, yes, I knew it was illegal.

Q. And were you cited for that?

A. Yes, I was.

Q. Does that restriction limit the amount of fish you can take for subsistence?

A. Yes. That was a good example right there. We didn't have any fish.

Q. To your knowledge, is that restriction still in place?

A. Yes.

Q. If it wasn't for that type of restriction, could your family use more fish?

A. Certainly.

Q. What are some of the other – have you used any other methods of fishing apart from hook and line?

A. Well, I tried spearing from a dark house once, but that didn't prove too successful for me, so I didn't go back to trying that again.

Q. Are fish and game used for ceremonial purposes by the Band?

A. Yes.

[IX-1157] Q. Can you give me some example? For example, are deer and bear used for ceremonial purposes?

A. Yes. There's certain animals that are required in certain ceremonies, but mostly it's wild game such as deer. There are berries, wild rice. And all this, with the exception of the rice, would have to be fresh.

Q. Are there parts of the deer and the bear that are used for medicinal purposes also?

A. Yes, they are.

Q. Have you ever been asked to get deer or other animals for ceremonies or for medicinal purposes?

A. Yes, I have.

Q. And are there times when you've been asked to get those things when the state season is closed?

A. Yes.

Q. And are there times when you can't find the animals someplace on the reservation and have to go off-reservation to get them?

A. Yeah, there are times.

Q. And in that case, if you want to get them, the only choice is to do it in violation of the state law?

A. Yes.

Q. Could you – did you learn from your parents about using different parts of the animals that you took?

A. Yes.

[IX-1158] Q. And what did they teach you about that?

A. Well, things that they had been taught, like certain parts of the deer's hooves that are used. The bones in their feet were made out to be like bone games for kids in their entertainment and stuff.

There were even parts of the teeth that were used in certain ceremonies and parts of the hair from the tail that were used in medicine dances. I don't know exactly how they were used. I was never told.

Q. Have you purchased state licenses to hunt?

A. Yes.

Q. And why have you done that?

A. Well, I don't want to get caught without one, because I just can't afford it.

Q. Did your parents and grandparents teach you to have respect for natural resources?

A. Yes.

Q. And how was that shown?

A. Mainly by the times at which you hunt, what you're going for, showing respect in making offerings for them.

Q. What kind of offerings would you make?

A. Tobacco offerings to prayer.

Q. Do you think that the ability to harvest natural resources was something that was important to your parents and to your grandparents?

[IX-1159] A. Yes.

Q. Do you think it was important to earlier generations in your family?

A. Yes, and even before them, because that's a way of life for the Indian people. And their respect for the animals and everything that's around that has a spirit was so integrated in their culture that it's just a way of life to them that will always be.

MR. SLONIM: Thank you, Mr. Dunkley. No further questions, Your Honor.

THE COURT: Ms. Fahey?

MS. FAHEY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. FAHEY:

Q. Good morning, Mr. Dunkley.

A. Good morning, Ms. Fahey.

Q. Mr. Dunkley, you're a named plaintiff in this lawsuit. Could you tell the Court how that came to be?

A. I was approached through Don Wadel and asked if I would be a plaintiff in this case because of the violation I had with the state D & R.

Q. Prior to you being contacted by Mr. Wadel, had you heard anything of this lawsuit?

A. No.

* * *

Dunkley Cross (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

* * *

[IX-1164] A. Yeah, that's correct.

Q. Mr. Dunkley, there's been some testimony regarding certain species of fish which are important to cultural events, correct?

A. Yes.

Q. How many times have you been asked to bring a particular species of fish to a cultural event or ceremony?

A. Fish? Once.

Q. Do you hunt or fish for sport, Mr. Dunkley?

A. No, I do not.

Q. In fact, you believe that one should only take animals to survive, for subsistence purposes only, is that correct?

A. Yes.

Q. Do you believe it is right for others to hunt or fish for fun or for sport?

A. I don't believe in that, no.

Q. And you don't condone the commercialization of hunting and fishing, do you?

A. In my own opinion, I don't.

Q. And you believe that it's wrong and against the Ojibwe culture, is that correct?

A. That was never part of the Ojibwe culture, to commercialize hunting or fishing.

MS. FAHEY: Thank you. I have no further questions.

THE COURT: Mr. Thompson?

* * *

[IX-1166] Q. But your view is more traditional than theirs, isn't it?

A. I couldn't say that it was more or less.

Q. The one time you were asked to get a northern for a funeral, that was in 1977?

A. Yes, I believe it was somewhere in there.

Q. Was your father – you indicated he had a couple of different jobs, one of them for the Minnesota Historical Society. Was that basically year-around employment for your father?

A. Could you repeat that, please?

Q. Sure. Did your father have year-round employment when he was working for the Historical Society?

A. No, he didn't.

Q. When did he work?

A. Mainly in the spring to the fall.

Q. You indicated that your father had done some trapping and had sold furs?

A. Yes.

Q. Are you aware of non-Indians trapping and selling furs in your areas?

A. Yes.

MR. THOMPSON: Nothing further.

THE COURT: Mr. Szotkowski?

MR. SZOTKOWSKI: No further questions, Your Honor.

THE COURT: Mr. Slonim?

* * *

Newell Direct (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[IX-1180] of my report. It seems to me that we have to look at the removal policy in its broadest context as really developing out of an early 19th century view of not only who Indian people were and how the United States and others looked at Indian people, but also in terms of how they looked at themselves.

We were a nation of, as Thomas Jefferson looked at us, as agrarians. And what we consider sort of the Jeffersonian ideal of what the foundation of the country would be would be that agrarian, that farmer, that human farmer.

And so the notions of that life-style and that view of what America was did run up into a conflict against indigenous peoples, or Native Americans. And part of it was that they saw, early philosophers and formulators of the American Indian policy, saw Indians as pursuing the chase, as living off the land, as we've heard a lot of testimony about here, and that that was in conflict with the agrarian principles on which they believed the country would be founded.

Often in the correspondence we see the term "the chase," and that really is a term of art for this period of time, because there's a lot of different principles or

notions that are attached to the chase. It's seen in some circles as akin to savagism.

It's seen also as – in certain circles, it's also seen as sort of a noble idea as well. But it's also seen as a [IX-1181] concept that may not continue, that is going to have to give way to a tide of the yeoman or the agrarian.

So what happens with removal is, that's an attempt, from a variety of motivations, to move Indians from east of the Mississippi to west of the Mississippi. One thing is to buy time, to allow them the opportunity to continue the chase until such time as they would be incorporated within a broader culture. There's other motivations, too.

Q. With respect to some of the rationales for the removal policy, were there kind of distinct areas where it was going to be applied or wasn't going to be applied? Or was it more of a comprehensive and concentrated effort?

A. In my view, it was comprehensive. Now, it also incorporates the idea that Indian interest in land would be extinguished, that that interest would be removed, and that that land would be brought into the public domain for sale. So, in that sense, it's a broad notion.

It is applied differently in different areas. There was removal as early as the 1818 period, 1819 period, 1820 period, down in the southeast with the Choctaw, Cherokee, Creek. When the removal policy was formulated, as we've heard, it was really encapsulized with the 1830 Removal Act. But removal had occurred before that and had occurred after that.

And in some of the areas that removal occurred, it wasn't necessarily just agricultural land, although you

see that a [IX-1182] lot in the documents, because, again, we're working in the framework of an agrarian society. But the Seminoles were removed from Florida, which was clearly swampland, and everyone at the time recognized this.

They removed for other reasons, for certain circumstances that relate to the Seminoles, but they were nonetheless removed. And we see the same thing, I think, in more relevance in this case, is in the 1842 removal treaty, where principally it was minerals that the United States was interested in at the time.

Q. So those rationales, then, extended beyond just this agricultural issue with the government?

A. In my view, it did. And also I might add at this time, too, that the removal policy had some ambivalence to it as well. Some of the early treaties and agreements with what were called the five civilized tribes – but the tribes of the southeast, Cherokee, Choctaw, Chickasaw, Creek and Seminole – also allowed for the allotment of land and the retaining of land within some of the areas that were removed.

Now, it was looked at, particularly by Andrew Jackson in the 1830s, it was looked at, if individuals did continue to do that, then they would do that under state law. In fact, he used that as sort of a rationale for encouraging removal.

Q. I think we'll turn next to the 1837 treaty. I'm just going to change the maps for the Court.

[IX-1183] Mr. Newell, was the 1837 treaty a removal treaty in kind of the classic sense?

A. No. And I said that in my report, that it did not require the removal of the Chippewa at that time.

Q. Was the primary interest in the federal government in seeking the 1837 ceded area an interest in the title to the land, or what was the primary interest of the government?

A. Well, I've indicated in my report that the 1837 treaty, in my view, was well within the framework of the removal policy at the time. It did not require removal at that time, but there was anticipation of it. And it certainly was a treaty of cession, and that was explained during the negotiations.

Q. And did you reference in your report discussion of that interchange between the Chippewa and the government?

A. Yes. I think I mentioned particularly between Flat Mouth, who was a Pillager at Leech Lake, and Governor Dodge.

Q. And did the Chippewa make clear that they wanted to reserve the privilege of hunting, fishing, and gathering on the ceded lands?

A. Yes, they did.

Q. How did vou view that in the analysis that you did as far as whether the government made that privilege a conditional privilege?

A. Well, in my view, the government in the treaty of 1837 [IX-1184] made that a conditional privilege and so indicated that. And I guess my evidence for that is the exchange regarding whether or not the lands would be

leased or whether or not they would be purchased in whole.

I guess I also do use some additional information subsequent to the treaty where there is anxiety about the possibility of removal as evidence that this point was made clear, in my view.

Q. And speaking as a historian, then, would it be your opinion that the Chippewa did, in fact, understand that condition that the government was imposing on the privilege?

A. Looking at it again from the evidence of actions, in the correspondence that we have that I can interpret as an historian, I think that that was clear. I do think, however, that the timing of this possible removal was left unclear. I don't think that the federal government knew when these lands might be required.

Also, as I said earlier, there is some ambivalence within the removal policy itself as to whether or not Indians might remove or they might actually stay and be incorporated within the political and social structure.

And so the best that I think that I can say is, there is this continuing uncertainty, which extends from the period of 1837 and, in my view, goes right up until the 1855 period, with the development of a reservation policy and the creation [IX-1185] of a reservation at Mille Lacs.

Q. Are there any particular documents that you recall from your analysis that seem to support your opinion in that regard?

A. Well, again, I'd just refer to my report in terms of the letters between the missionaries. We've heard the testimony in the past about the Boutwell letter. I'm not sure exactly how to read the term "during the pleasure of the President" and the Chippewa not understanding that.

It seems clear to me, however, that there is a period of time – and I reference it in my report – in context, that letter indicates that there is a period of time that people were looking at in terms of how long the Chippewa might remain. That, along with the other correspondence of the missionaries, suggests to me that they're concerned about this.

Q. I believe your report also has a section on the 1842 treaty?

A. Yes, it does.

Q. Could you relate to the Court what you thought the significance of that treaty was in your analysis?

A. Well, in the 1842 treaty, we do have a clear expression of removal. And I think that that also contributed to this anxiety and this concern, this uncertainty, particularly over when that might occur.

[IX-1186] Obviously, we have no contemporaneous record of the negotiations, although we do have subsequent accounts of those negotiations. But it's clear that there was a provision in the treaty to remove, that it was explained that it might happen at some time in the future, and, if that were required, then there'd need to be a reservation of land, which would have been to the Fond du Lac area to the north, for the Chippewa to remove to.

And that's why that land was provided there. And it seems to me it's clear, then, that that contributes to this overall concern and uncertainty during the period.

Q. And then in 1847 there was another treaty with the Chippewa, is that correct?

A. Yes. And this was principally to acquire lands in Minnesota for the removal of both the Winnebago and the Menominee. There was also an attempt to acquire the lands around Fond du Lac in 1847, although that did not succeed.

Q. And as part of that discussion in the section on the 1847 treaty, I believe you reference the occurrence of President Taylor's issuance of the 1850 executive order??

A. Yes, when the order was issued in February of 1850. I do have a short discussion of that as well.

Q. From the federal government's perspective, what did you see as the purpose of that order?

A. Well, from my perspective in looking at the documents, it [IX-1187] seems to me that the order was twofold – one, to remove any of the remaining interests in the areas that had been ceded in 1837 and '42, and then particularly to remove the Lake Superior Chippewa to Minnesota.

There's a letter from Hall to Treat in March of 1850 – and I think I reference it here, my footnote 86 – where he includes the extract of the Commissioner's report to Ramsey, where it clearly indicates that there's two parts to the order. There's the part that revokes their rights, and then the other part also to remove.

So I don't think I can read it any differently than that, although I have said in my report that, in terms of the Mille Lacs, I don't think that the removal part had any real bearing on their location.

Q. And you're referring to the removal effort there?

A. The effort, yes.

Q. And did you find any other documents that seemed to support what the purpose of the federal government was?

A. Well, I have a number of other materials that I have listed in here. There are, obviously, annual reports from the 1849 period – '48, I guess; actually from both – talking, about the possibility of removal.

That same letter from Hall to Treat references those reports. It says, "For the last few years, the issue of removal has been reported in the Commissioner's annual [IX-1188] reports." So I think that all that evidence together suggests that that was a federal policy at that time.

Q. Did you consider, or did you find in your analysis, that there were probably other motivations that may have been involved as well?

A. Certainly. There isn't any question that there was motivations – again, on many of these actions, given the fiduciary, political interests that parties had, whether it be along the Mississippi River or at Lake Superior – that all of those actions influenced both removal, or the call for removal, as well as, in my view, requests for the Chippewa to stay in Lake Superior.

And, again, I refer to letters from Missionary Hall, who says it's not just the economic interests on the Mississippi, but we have these same interests at Lake Superior. So, you know, on balance, I think, the Chippewa, as I indicated in here, seem to me to be caught in the middle of those forces.

Q. In your study of the record, what was the general reaction to removal?

A. Well, there isn't any question that the Chippewa, particularly those around Lake Superior, opposed removal and did not want to remove. Missionaries came to their aid; other individuals came to their aid; fur traders came to their aid. But there was clear opposition to removal.

Q. And at some point did the removal efforts and that policy [IX-1189] end?

A. Yes. In my view, after the disaster in 1850 and '51 at Sandy Lake, I think removal was a moot point. I don't think that it would have been possible to have removed in the same manner.

Now, it is true that Watrous and others used the annuity payments as a way of inducing the Chippewa to remove, and that continued for some time. And that isn't unusual. That's happened throughout the history of federal Indian relations where those kinds of inducements were used to effect Indian behavior.

But I think the kind of – I think one of the terms that's been used – it's a little more passive after the

winter of '51. I think I would agree with that. It's probably more passive activity than the more active that we saw before that.

Q. With regard to the temporary suspension of the removal effort in 1851, why do you think that the government took that action, to telegram the agent and tell him to suspend removal efforts?

A. Well, again, I think that Sandy Lake had a great deal to do with it. I think we're also at a period of time when there is changing policy in the United States. It's really an evolution.

Historians have looked at this period as the evolution of [IX-1190] a reservation system. Now, it's not to say we haven't had reservations prior to this; we clearly did. But they tended to be reservations for individuals.

Now, in the '50s, particularly with the extension of the American sovereignty over the Mexican possessions, there's no longer any area in which to create an Indian barrier to remove Indians. And it's looked at now as creating enclaves or reservations in which to effect a change in Indian life-style. And so we see that occurring, as well as a number of other bureaucratic changes, administrative changes, at that time. Q. With regard to your discussions of what Ramsey and Watrous continued to do to try to passively continue that policy, did your research and analysis seem to indicate that the central office in Washington were aware of what Ramsey and Watrous were doing?

A. Yes. I see no indication that they were not informed of it.

Q. Did you find any indication that anyone told them that what they were doing was against the policy or was unlawful or that they should stop their efforts?

A. I haven't found anything to that effect, I mean outside of the temporary suspension order that we've mentioned earlier.

Q. And did you find anything that would indicate that the 1850 order was ever expressly and formally revoked?

[IX-1191] A. I haven't found anything to that effect.

Q. How do you think that the removal efforts affected the Mille Lacs Band?

A. Well, I have a very short section on that in my report. And I say that I think that, given their location right at the boundary of the 1837 ceded area, that, you know, it didn't really affect them in terms of removal per se. They obviously – it was intended that some bands would be removed up to the Mille Lacs area, the St. Croix particularly, and I think they obviously were affected by that.

There was also some discussion between Watrous and Ramsey as the possibility – and I think even Clement Beaulieu suggested this – that maybe not everybody could be at Mille Lacs. They might have to move them somewhere further west. But, generally, given their location, they were not at this period of time, were not affected by removal.

Q. Did your research and your analysis find anything that would have specifically exempted the Mille Lacs Band from the order of 1850?

A. I haven't found anything to that effect.

Q. You had said earlier, Mr. Newell, that government policy was indeed in a bit of a flux in the 1850s here. Did a new policy emerge by the mid-1850s?

A. Yes. And we actually see it – and I mention that in my report – that we see that with Commissioner Medill's [IX-1192] discussions in his annual reports in '48. That continues through the '49 period, and then really reaches – I think it's embryonic in this period – it wasn't really until Manypenny, Commissioner Manypenny, comes in in '53, March of '53, that we see the implementation of the new reservation policy.

Q. And how was that policy implemented?

A. Well, the policy, first of all, I should state, was continued cession of lands and of Indian interests. And I think that remains a constant.

At the same time, the reservations were seen as these enclaves in which the Indians could buy time in which to make a transition to a more agrarian life-style. There were the continued efforts at Christianization and education, which go all the way back to the Civilization Fund of 1819.

The hallmark of the Manypenny period is really the allotment policy, which is no longer just an allotment of lands to particular figures within the tribe, but allotments in severalty to all members of the tribe, all adult male members of the tribe, at some point in the future. And that's something that is very distinctive about the Manypenny period in the treaties.

Q. Was that policy designed to provide a permanent home for the Chippewa?

A. Yes, I believe it was. I believe that the allotment of [IX-1193] lands were carved out of areas that they wanted, that they expressed a desire to be in, and I think it was intended to be permanent.

Q. With regard to this region of the country, where would have that policy first been used or implemented?

A. We first see it with the treaty of 1854 at Lake Superior in the establishment of reservations for the bands around Lake Superior.

Q. And were the Mille Lacs party to that treaty?

A. No, the Mille Lacs did not participate in that treaty.

Q. Do you think the treaty, or the events surrounding that treaty, affected the Mille Lacs Band?

A. Well, again, I think this vacuum that I talk about is certainly engendering concern for all Chippewa. And I think that the failure to have a treaty, to have a reservation established, in '54 certainly led to interest in having those lands defined, and particularly at Mille Lacs, and, in my view, was a motivating factor for them to reach an agreement, as well as other Mississippi Chippewa in the 1855 treaty at Washington.

Q. Were there other things going on or happening near and around Mille Lacs that would have put additional reasons and pressures on the Mille Lacs to secure reservations through a later treaty?

A. Yes, and I talk about that in the report. And we've [IX-1194] heard over the last week and a half a lot of testimony, too, in regards to the logging at Rum River, which, from all accounts, looks like it began really in

earnest about 1849 or 1850, although there's some indication that there may have been some earlier logging there in the 1820s. But the real activity occurred in the late 1840s, early 1850s, and, in my view, was substantial.

I have a section that talks about that, and it talks about the surveying that occurred in 1851 on the Rum River. And all of this activity, I think, it seems logical to me that it would engender some concern.

We have references to logging. And I think at one point I mention that the references that we have, from later reminiscence, are for anywhere from 23-million to 30-million board feet of timber coming down the Rum River. Well, that is a very sketchy comparison, but that could equal anywhere from 100 to 50 to 200,000 logs coming down the river during that season, during that navigable season. And that, I think, is a pretty substantial activity.

Q. And that's an activity that anyone living in the area would probably have been aware of?

A. Well, I think so. It seems logical to me.

Q. Then the Mille Lacs Band did go ahead and enter into a treaty with the federal government to secure a reservation, isn't that correct?

[IX-1195] A. That's correct, in 1855.

Q. What do you think motivated the federal government to seek that particular treaty with the Mississippi Chippewa?

A. Well, again, I think with this change in policy that I talked about earlier, and the view of establishing reservations and of clearing whatever interest was remaining, I think that that was the motivation behind the 1855 treaty.

Q. Did your study and research and analysis give you any indication of what would have been motivating Mille Lacs from the treaty perspective as well?

A. Of course, the treaty is really silent – we've heard this earlier this week – but the treaty is silent in terms of the actual selection of reservations. We can only infer from the results and from what Manypenny desired, and did convey that, in the negotiations.

But I think that the Mille Lacs wanted their reservation on the south end of the lake and that they secured that. And that was their motivation.

Q. Mr. Newell, with respect to the 1855 negotiations, would it be your opinion that that treaty dealt only with the cession of land from the Chippewa to the federal government?

A. I think, viewed in perspective of what the government was attempting to do, what had occurred earlier, particularly from the 1850 period on, that their desire was to clear their remaining interest in that area, as well as looking at any [IX-1196] claims that these Chippewa might have to other areas as well, particularly up in the northwest end of Minnesota.

Q. With regard to the silence on discussion of further hunting and fishing privileges, what did you take that to mean by your study and research?

A. I just don't think it was an issue at that time. And I'm inferring from what the Mille Lacs wanted in terms of a fishery, which we know is good fishery there.

The ricing areas, you know, that's where the controversy was at the moment, and I think that they got those areas, or at least most of them. It is true that there was some concern about where the boundary was, and that engendered some discussion later on. But I think they got what they wanted and what they needed.

Q. With respect to the lack of mention of the privileges of hunting and fishing in the cession that was made in 1855, did you find anything that would indicate what either party's intent and objective may have been from that?

A. There just isn't any discussion in the treaty journal on hunting and fishing. Again, I look at it with respect to what I think the, particularly in the federal government, what their motivations would be in clearing this interest. And I think that's what they expected out of the treaty.

Q. With regard to some of the correspondence that we've heard testimony on right kind of contemporaneously with the [IX-1197] actual negotiation of the treaty, would you comment on the exchanges between, I believe it was Lieutenant Hamilton, and then some of the Gorman correspondence as well that we've heard about?

A. Well, I will. And I have a discussion about the events with the dam at Rum River, which I won't go into a lot of detail, because we've heard quite a bit of talk about that.

In my view of reading those letters, I think they're very difficult to interpret, because they used the term

"treaty" in there. And it's difficult, given the context of what's happening at the time, to really know what treaty they're referring to.

I think this is something we need to look at as we look at all three pieces of correspondence, is that there isn't in any of those documents specific reference to the 1837 treaty, or even to the treaty of St. Peters. There's nothing in there that I found that references those particularly.

The other events surrounding the correspondences – we know that the Chippewa are back in Washington negotiating the treaty. That was well reported in the newspapers. We also know the Chippewa were concerned principally about those ricing areas.

And it really isn't hunting and fishing, in my view; it's the ricing areas per se. It's the rice that's affixed to the land. So I think you have to look at those letters with that [IX-1198] respect.

Q. With respect to the actual discussion that we had on the Hamilton letter, did you consider reasons why there may have been a reference or not a reference to any particular treaty in that correspondence?

A. Well, I looked at the Hamilton letter, and my conclusion – I think that there are a number of possibilities. It is always possible that he could have been referring to 1837. I don't think that's the most likely conclusion.

I think it's more likely that he was referring to the 1854 agreement between Gorman – and we do have references to it being called a treaty – well, not so much that, but a subsequent agreement in July of '55, they talk about

a treaty. And so they use these terms somewhat loosely, I should say.

My view of looking at the contemporary correspondence in terms of what was known, when he went up there, when he negotiated, and when he came back down, is that I think he's referring to the anticipated 1855 treaty. And I believe that, because he's back into Fort Snelling writing this reply on the 7th of March.

On the 6th of March there's a reference to the treaty being concluded in Washington, without any details, but just that it was concluded. And then he writes a letter on the 9th of March. And it seems to me the sequence of events, given [IX-1199] his position as a lieutenant, that that's probably what he's referring to.

Q. With regard to the period beyond 1855 – I know that that was beyond the scope of your report – but could you comment on, first, why you directed your approach to that period between 1837 and 1855 and why you thought that that was of importance?

A. Well, again, I've done, as I indicated earlier when we started, I've done a little bit of work in the later period with the Chippewa, just in terms of the 1863 and '64 treaty and then the Nelson Act. Most of my work has been related to forestry, which I think is outside the scope of this discussion.

But I know that there were serious concerns that the Mille Lacs had, as well as other Chippewa had, for maintaining those reservations. And I think it becomes very difficult to separate out their concern for maintaining the

reservation and their hold on the reservation from references to the 1837 treaty and to any privileges that they might have believed that they had under those. And so I think it's just too difficult a task to relate those subsequent events clearly to 1837.

Q. And did you think that it was of more concern to provide the analysis between the time of the treaties for the Court's review?

[IX-1200] A. In my view, it was.

Q. Given kind of the independent knowledge that you have of those later events that occurred after 1855, have you had a chance to review the report submitted by Dr. McClurken?

A. Yes, I've reviewed the report and the materials that Dr. McClurken used for his support.

Q. And could you comment, even though you haven't undertaken a study of the same time period, what you found or what you would expect to include in a similar analysis?

A. Well, I think that Dr. McClurken has done a good job of explaining the various impacts on particularly the Mille Lacs Chippewas in terms of the attempts to gain access to the reservation, to cut pine timber, and their efforts to maintain a hold there. But I haven't found anything in there, in the review of the documents or the report, that expresses an indication that these rights in '37 were continued.

I mean, they do continue to hunt, and they do continue to fish, particularly in the areas that they had

secured in '55. But I see no reference in there to '37 and to those privileges.

Q. Would your earlier studies of that time period have included some analysis of the purpose of the '63 and '64 treaties and the Nelson Act in 1889, and some of those later events that were both reported on and testified to during the past few days?

* * *

Newell Cross (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[IX-1217] your conclusion that, notwithstanding the provision for hunting, fishing, and gathering privileges, that the government did acquire the Chippewas' interest in the lands in that treaty?

A. With '37, yes.

Q. And I think you indicated to Mr. Szotkowski that the hunting, fishing, and gathering privileges were something that the Chippewa were requesting, something they asked for in the negotiations?

A. Yes. That's the way it's been interpreted.

Q. I want to see if I understand how you view Governor Dodge's thinking in terms of making that privilege conditional in some sense. And the way I understand your report, you've said that that has to be viewed in the context of removal policy, is that correct?

A. Yes. I think that, you know, as I've explained removal policy this morning, I think that you have to look at it in relation to that policy, yes.

Q. And so, again, in terms of what Governor Dodge was thinking, it was important to have that privilege be conditional so that when – and this was uncertain – but when we got to the point that white settlement was advancing to this area, the policy would call for the

removal of the Chippewa, and therefore it would be necessary to have some way of terminating this privilege. Is that a fair statement?

[IX-1218] A. Well, I guess so. But I've also indicated this morning there was obviously some ambivalence within the policy, too. And one possibility might have been that Indians would have remained, some would have remained there, but certainly not in the same fashion as with the privilege, no.

I'm not sure I'm real clear about that. But I indicated this morning that some removal treaties also had allotment provisions within them, or allowed for that, and that may have been also a consideration, too.

Q. Removal itself was not discussed at the time of the 1837 treaty with the Chippewa, was it?

A. It's not discussed in the negotiations, no.

Q. And there's no specific provision about that in the treaty, is there?

A. No, there's no specific provision.

Q. You say – I'm now looking at the top of page 4 of your report – that federal policy surrounding the 1837 treaty also envisioned consolidating Chippewa on lands west of the Mississippi River. Do you see that?

A. Yes.

Q. There's also nothing in the treaty in which the Chippewa agree to remove to lands west of the Mississippi River, is there?

A. No. I just said that there's no discussion of removal in that treaty.

[IX-1219] Q. And I'm just focusing on the area. There was no reference to movement west of the Mississippi either?

A. In the treaty?

Q. Right.

A. No.

Q. There was also no mention of removing the Chippewa, either in general or to a specific area west of the Mississippi, in Commissioner Harris's letter of instructions for this treaty, was there?

A. I'd have to go back and actually look at the instructions. There was no mention of a specific area, as I recall. I really should probably go to that section if we're going to talk about specific letters.

Q. I'm sure you have this cited. It's our Exhibit P-46. We'll get a copy of the letter.

A. Harris to Dodge, it's my 21.

Q. Which would you prefer?

A. I'll get mine, if I could.

Q. Okay. That's fine.

A. Actually, you may have a transcription, and yours might be better than mine. But my copy is pretty legible.

Q. And my question – and we talked about this at your deposition – do you recall whether there is any

mention in that letter of removal of the Chippewa or direction to include a provision in the treaty regarding their removal?

[IX-1220] A. No. He's talking specifically about acquisition of the land, and the reason for that being the pine timber, as I've cited here.

Q. Okay. And he doesn't say anything about removal?

A. Well, I'd have to go back and look at the whole letter again, but I didn't cite anything about that in my report, so –

Q. Continuing on page 4 of your report, you say that since none of the negotiators of the 1837 treaty had a clear understanding of when the ceded lands would be required for non-Indian settlement, they agreed to allow the Chippewa the privilege of hunting, fishing, and gathering on the ceded lands at the discretion of the President. Do you see that?

A. Yes.

Q. And that, again, is a link between the conditional nature of the privilege and the notion that in the future there would be settlement and a need for removal?

A. Well, yes. I mean, it says what it says, is that the understanding was that ceded lands, they were uncertain when they'd be required for settlement.

Q. And at least at this time under the removal policy, when settlement reached an area, the policy generally was to remove the Indians. That's what you're saying here?

A. Yes. Or actually settlement may have already started prior to that, as you're saying, or it might have been, again, [IX-1221] anticipatory. A lot of times, it seems to me, in terms of when actual removal is required, it depends on the very specific circumstances with the tribes involved.

Q. Now, in terms of the policy, though, as I think you've indicated, the policy of removing Indians as settlement advances changes by the mid-1850s, is that correct?

A. Yes. I mean, I wouldn't push it as far as the mid-1850s. I think the policy is beginning to change – and most historians look at it this way – it's beginning to change by the late 1840s, really after the acquisition of Mexican territories. And that's speaking pretty broadly.

Obviously, in particular areas it might have continued beyond that. We kind of go through an evolutionary phase of what's called consolidation, or colonies, and that's what Medill talked about in the late 1840s. That's kind of a transition phase.

Q. And as we move into the reservation phase, the policy is that the Indians would remain in their traditional land with homes on reservations?

A. Yes. I should qualify that a bit, too, because I think the intention was to keep them within their traditional lands. But we also see – Manypenny was penurious, and he also didn't want to spend very much money on reservations. And so he wanted as few as possible.

He wasn't able to get that most of the time, but he [IX-1222] wanted as few as possible. And so he actually thought about consolidating a number of tribes together on fairly large reservations.

Q. In some of the treaties that are negotiated during this period when reservations were being created in traditional lands, are there provisions for off-reservation hunting and fishing rights?

A. Yes, there are in some.

Q. One of them is the 1854 Chippewa treaty?

A. Yes, there was.

Q. Continuing on in your report in the introductory section, you have a discussion of the effort to remove the Lake Superior Chippewa to lands west of the Mississippi River between 1850 and 1851?

A. Yes.

Q. And then you say that this was effected by the issuance of an executive order on February 6, 1850?

A. Yes.

Q. Do you have an opinion whether the government would have issued an order revoking hunting and fishing rights if it had not been making an effort to remove the Lake Superior Chippewa?

A. That's really speculation, I guess, since that's not what happened. I frankly hadn't thought about that. I don't know. I know that the government desired to have the interests, to [IX-1223] have any interests, removed. But since that's not what happened, it's just speculation.

Q. Can you tell me where in your report you discuss this desire to have the interests removed? Where is it discussed explicitly?

A. Well, I think it's implicit throughout the report in terms of looking at the policy and the conditional nature of the rights.

Q. Well, I'm talking in terms of what's happening in 1850. Is there any historical document that you found which talks about a desire to remove the interests in lands?

A. The document I mentioned earlier today talks about two separate parts to the order. And certainly the intention, it seems to me, is pretty clear from the surrounding circumstances and events that they're trying to extinguish whatever interests may remain there and to have these people, you know, move to an area that's separate from those areas.

I guess the other way I would respond to it is that if you look at the philosophical notion of the chase, as I talked about earlier today, if the Chippewa and if tribal members were to continue, if it was thought by the federal government that they were to continue to pursue the chase, I think that would have been almost antithetical to the notion, philosophical notion, of what settlement was – it seems pretty clear to me from both the philosophy and the actions [IX-1224] around that period.

Q. Well, the letter you're mentioning is a letter from the Missionary Sherman Hall?

A. Yes.

Q. Are there any government documents that you have where government officials in this period say that one of their objectives is to clear interest in land in connection with this order?

A. Well, the government reports from 1848, 1849, talk about the need to promote settlement; it's time now to make way for the settlement. And I guess that seems to me to be an expression of the government's desire to clear these interests.

Q. Well, as I recall, all of those reports talk about removing Indians and that that's what has to happen in order to make way for settlement. I don't recall any of those reports talking about removing interests in land. And my question is, is there a document that I've overlooked?

A. No. I think we're all dealing with the same documents. I think that the whole premise and notion behind the policy suggests that.

There is not – I mean, to answer your question – there isn't anything that I've seen that says specifically, you know, removing this particular interest outside of the Presidential order, and the other documents that I've referred [IX-1225] to that say, here's what was done and it's two-part. But I don't know that I can answer any more specifically than that.

Q. Well, in connection with the 1854 treaty, the government – that's one of the treaties that has a provision for hunting and fishing rights, is that right?

A. Yes, it does. It's conditional, though, and I think you would agree with that.

Q. And in connection with that treaty, that was a treaty that was negotiated under the reservation policy?

A. Oh, yes.

Q. And it was negotiated by someone who was familiar with the reservation policy?

A. Yes, I would agree with that.

Q. That was Henry Gilbert?

A. Yes.

Q. And he apparently didn't see any inconsistency between the policy at that time and providing for hunting and fishing rights off-reservation. Is that a fair statement?

A. Well, I think it's fair to say, but I think you'd also have to say, as I indicated, that it is conditional on the President. I don't remember exactly the terminology of it – I suppose we could get it if we need to – but it was conditional. And, also, I think you have to look at how they looked at those northern lands as being perhaps, again, an area that they weren't particularly concerned with at that [IX-1226] time.

Q. And did you find any documents that suggest they had different views with respect to the lands that the Mille Lacs people were occupying?

A. Just the documents that I've mentioned.

Q. I'm still in the introductory section. You have a statement – and I think you've covered this in your direct testimony – that "There's no contemporaneous historical evidence, however, that the executive order of February 6, 1850 was rescinded or that the revocation of hunting

and fishing privileges did not remain in effect with respect to the Mille Lacs Chippewa." Do you see that?

A. Yes.

Q. And I don't want to go in detail into the Gorman and Hamilton letters right now, but just with respect to the first letter, Governor Gorman's letter of February 16, 1855, which refers to the Indians having ceded the lands and having no interest except hunting and fishing. Do you recall that letter?

A. I do. But I really would want to get these letters, if we're going to get into them, if I could.

Q. Sure. That's fine.

A. And I need to find my notes, so I can make sure which one it is.

Q. Do you want us to get ours, or would you prefer to get [IX-1227] yours?

A. Either way. If you have a transcription of one, that would be fine.

Q. Ours is P-16 or P-17.

A. Yes, I have it.

Q. And in that letter, is it your opinion that Governor Gorman is referring to a treaty interest in hunting and fishing under the 1837 treaty?

A. Well, this is one, I guess, we didn't talk about on direct, but it's another one that I think is subject to a variety of interpretation. I'll tell you how I guess I interpret it. I think that – you know, I guess it is conceivable

that he is thinking about the '37 treaty in some fashion, because, of course, I think they were aware of the '37 treaty at this time.

There's no question they were aware that there was a cession of land. I think they knew that. I think it's also conceivable that he's referring, you know, back to a period when the dam went in at that time, and I think that's another interpretation.

Q. Why don't you read the sentence that refers to hunting and fishing.

A. Okay. I think there's supposed to be a parentheses in here, too, as I remember, if I'm not mistaken. "The lands occupied by the timbermen have been surveyed and sold by the [IX-1228] United States and the Indians have no other treaty interests except hunting and fishing."

Q. And you read that to say they have no other treaty interests except hunting and fishing six years earlier?

A. Well, as I say, I think it's subject to a couple of interpretations. And I will grant you that I think he does have in mind also the '37 treaty at this point.

Q. That letter refers to the '37 treaty?

A. I think it refers to the cession and to that reservation, that particular privilege, yeah.

Q. And that would be at least some historical evidence that the revocation of hunting and fishing privileges was not in effect with respect to the Mille Lacs Band at the time this letter was written?

A. Well, you know, it's written before the treaty, the '55 treaty. It's written on the 16th before the '55 treaty. Let me go back to what I've written in here, and if we're splitting hairs on it, I suppose that I would concede one point on it in this introductory section.

But I stand by the statement I made earlier that I haven't – we have this one letter, perhaps – but I don't have anything in terms of a revocation, any document that says it was revoked. And I haven't seen anything subsequent where it says that it was.

Q. We'll come back to the letters. I just want to be clear, [IX-1229] because I understood at your deposition this pretty clearly, that it was your opinion that that letter referred to the 1837 treaty.

A. There's two Gorman letters, and I think we may be getting them confused.

Q. This one, at least, refers to the '37 treaty?

A. Yes. I think that he's referring here to the '37.

Q. Okay. Now, with respect to the 1855 treaty, and just moving to the next paragraph in this introductory section, once the reservation was created for the Mille Lacs Ojibwe, the government did not intend that they would still be obligated to remove under the 1850 order, did it?

A. I think, again, it seems to me that by negotiating the treaty and by confirming the reservation, that that earlier order in terms of removal was moot.

Q. I take it that's an affirmative answer, that they didn't intend at that point that they were still obligated to remove under the 1850 order?

A. I think circumstances had changed, yes.

Q. During the 1855 treaty negotiations, did the government explain to the Chippewa that the treaty would extinguish their rights to hunt, fish, and gather under the 1837 treaty?

A. During the 1855 negotiations?

Q. Correct.

A. There wasn't any discussion of hunting and fishing that I [IX-1230] can recall in those negotiations.

Q. And do you have any opinion as to whether the Mille Lacs Band understood the treaty to affect the privilege of hunting, fishing, and gathering under the 1837 treaty?

A. Well, I guess my opinion is that, you know, from the face of the treaty and from what the parties were intending – and that would include the Mille Lacs, too – that they got what they wanted in the '55 treaty in terms of the reservation, in terms of those areas that were particularly important to them. I can't point to any passage in there that indicates that they were referring back to '37.

Q. So, as I understand it, you don't have an opinion as to whether the Band understood that the treaty would affect their rights under – the '55 treaty would affect 1837 treaty rights?

A. I think it's very difficult to determine what the Band understood in those negotiations outside of looking at what might have motivated them. But I can't get into the mind of the negotiators and say that they understood something that's not available in the record.

Q. Let's turn to the substantive part of the report, beginning with the 1837 treaty. And on page 10 you have a discussion of removal policy and a reference to the 1830 Removal Act?

A. Yes.

[IX-1231] Q. And that Act, as you indicate, authorized the President to arrange for the removal of tribes that consented to remove, is that correct?

A. That's true.

Q. And the Andrew Jackson speech that you quote also indicates that a tribe's consent was necessary for removal, doesn't it?

A. Yeah. I think – well, I won't go into a dissertation on the dynamics of the passage of the Removal Act – but I think that it was a real compromise between some of the hard-liners, like Jackson, who really wanted removal, and many of the more reformist-oriented individuals who were opposed to removal. So that language in a lot of this has to be viewed in context to all the controversy surrounding that Act.

Q. And one thing that came out of that compromise was a requirement of tribal consent? Is that what you're saying?

A. It was, but it wasn't always followed. It wasn't followed with the Creeks, for instance.

Q. It wasn't followed in this case either. To your knowledge, did Congress ever authorize the President to remove Indians without their consent?

A. Only in the sense that they would have provided appropriations. But I'd have to really go back and look at those specific – but I can think of some efforts to remove which may have been done without necessarily consent.

* * *

[IX-1239] Q. I guess I was confused. Beginning at the bottom of page 14 of your report, and then continuing over to page 18, you discuss various comments from federal officials, some comments that are attributed to the Chippewa, and comments from missionaries in the years following the 1837 treaty, is that correct?

A. Yes.

Q. And I read this part of the report to suggest that removal was something that was being discussed at this period of time, but not to say that the Chippewas had actually agreed to some removal plan as part of the 1837 treaty. Is that a fair reading?

A. I think that's a fair reading of it.

Q. And I think in your deposition you used the phrase – and I can give you page references, if you want – but you used the phrase that removal was kind of in the air at this period of time. Is that a fair characterization?

A. For want of a better phrase at this time, I'd say so.

Q. Now, in this section of the report, you didn't discuss Governor Dodge's report or correspondence on the treaty during this time period, did you?

A. Well, I thought I referenced his – I mean, I've got some correspondence to Dodge that's referenced.

Q. I'm asking about Dodge's report, what he was saying about the treaty. Is that discussed?

[IX-1240] A. I'm not sure if there's reference to his annual report in this section. I don't know whether I've got it in one of the –

Q. Let me have you look first at what's marked Exhibit P-55, which is a letter, dated August 13, 1837, from Governor Dodge to Commissioner Harris, which I believe is Governor Dodge's report on the treaty negotiations. Is that correct?

A. Yes.

Q. And is that a document you've looked at before?

A. I've looked at it before.

Q. Does that report say that the Chippewa had agreed to remove as part of the treaty?

A. You know, as I said many times, I don't think that these documents say that, no.

Q. Does that report say anything about removal?

A. It doesn't talk about removal. It talks about the acquisition of land.

Q. At the bottom of page 14 – I'm back in your report now – you have a quote from Secretary of War

Poinsett, in which you say that Poinsett expresses his views about why Congress authorized the Chippewa treaty. Do you see that?

A. Yes.

Q. Now, wasn't Poinsett referring to the treaty with the Sioux and not the treaty with the Chippewa in that passage?

A. Well, I'd have to go to my note and look at it. I [IX-1241] thought that he was – I mean, there were other treaties with the Sioux as well at that time, and I think he was speaking broadly about the treaties.

Q. Why don't you look at the letter and tell me whether he's referring to the Chippewa treaty or the Sioux treaty in this particular passage.

A. It's a pretty long letter. I don't have a transcription here of it.

Q. Let me try to read on the first page, and you can follow it and tell me – I think this is the passage that you've quoted from. I'm going to start on the sixth line of the first page where it says, "I have the honor." Do you see that?

A. Yes.

Q. "I have the honor to state that on entering upon the duties of the War Department, I found that Congress had imposed upon the executive that of negotiating a treaty with the Sioux Indians." Do you see that?

A. I think I see where you're referring to it. I also see up here where he's talking about the Sioux, Winnebago, and Chippewa.

Q. All right. Well, let me just keep reading. You do see the sentence where he refers to the duty of negotiating a treaty with the Sioux Indians? And then the next sentence continues, "and that it devolved upon me to carry their [IX-1242] directions into effect." Is that a reference to negotiating the Sioux treaty?

A. Yes.

Q. And then the next sentence, "Congress, I presume, were governed by the information received at this department from Governor Dodge, Major Taliaferro, and other agents well acquainted with the interests of the government in that portion of our country, as well as by their own desire to carry out the views and policy of the government in removing the Indians from all the lands east of the Mississippi, and the Sioux especially from the eastern shore and islands of that river, the free navigation of which is of so much importance to the country above and below this tract."

And, again, is this a further discussion of reasons for the Sioux treaty?

A. It's talking about the Sioux. But you can only do that if you want to ignore when he's talking about the Sioux, Winnebago, and Chippewa at the beginning, when he's reporting on ratifying the treaties.

Q. Well, why don't you read the part that you're referring to.

A. Just when he says, "In replying to your note of the 5th instant in which you request my opinion in relation to the importance of ratifying the treaties recently

made with the Sioux, Winnebago and Chippewa now before the Senate."

[IX-1243] Q. And then the next part that I was reading from discusses specifically the Sioux treaty?

A. That's true.

Q. All right. Is there later in the letter a specific discussion of the Chippewa treaty?

A. Without going back through here, I don't recall offhand. I know there's some discussion here later on the Chippewa, but I'd have to go back and read the whole thing.

Q. Well, let me refer you to what happened at the deposition on this, and maybe we can save some time.

A. Okay.

Q. And this is beginning on page 274 of the deposition transcript, at the bottom of that page, line 24.

"Question: Is there a passage in this letter that deals particularly with the Chippewa treaty?

"Answer: I don't recall now. I'd have to read the whole letter again.

"Question: Well, look at the bottom of the second page of the letter. Do you see where at the very bottom of that page it says 'second'?

"Answer: Yes, there is a section on the Chippewa, and I think later he talked about the Winnebago.

"Question: Is there any discussion of removal in this section on the Chippewa?

"Answer: No. He doesn't talk about removing the [IX-1244] Chippewa in this letter that I recall."

Do you have any different recollection today?

A. No.

Q. Now back to your report. In the next paragraph on page 15 of your report, you have a quote from Commissioner Harris's 1837 annual report. Do you see that?

A. Yes.

Q. And is this – this quotation is taken from a portion of the annual report in which the Commissioner is providing a general summary, likely based on reports he's received from various superintendents and agents?

A. Yes, he would be.

Q. And in the portion that you're quoting, Harris is talking about a number of treaties, including not just the treaty with the Chippewa, but also the treaty with the Sioux and the Winnebago and the Sac and Fox?

A. Well, again, I'd have to go specifically to the letter. But I would agree, as I say, the treaty and similar treaties with other tribes.

Q. Do you recall Governor Dodge's portion of this annual report? Is that something that you've looked at?

A. I probably have looked at it. I don't recall specifically.

Q. Why don't you look at Exhibit P-56. And I think you'll see, starting on page 14 is Governor Dodge's report?

* * *

[IX-1250] observed, that the 1837 treaty has no provision by which the Chippewa consented to be removed?

A. I think that it is – I mean, the treaty stands on itself, and it doesn't have a provision that I've seen that talks about removal. His position is that they need to provide some provision for that removal and settlement.

Q. Just to summarize for a moment this last set of documents we've been through, we talked about the letter from Secretary of War Poinsett, a report from Commissioner Harris, and the Bushnell report, all of which you cited. And then I've asked you about the other letter from Bushnell and a couple reports from Governor Dodge which you hadn't cited.

None of those officials suggest that the Chippewa had agreed to remove in the 1837 treaty, do they?

A. There's no mention of an agreement as a result of that treaty in these documents.

Q. Do any of those officials say that the Chippewa could simply be ordered to remove under the 1837 treaty?

A. There's no talk of an order per se. I mean, they talk about other provisions, or whatever, and I don't know whether that just implies just to provisions, for instance, that they ultimately did provide in terms of annuities and supplies to assist in their removal.

Q. Do you think it would have been consistent with federal policy at the time simply to order the removal of the Chippewa

* * *

[X-1284] indefinite future, they were needed for more intensive settlement, that the policy would be to remove the Indians?

A. Well, yes. I think that, again, the extended time, at least from the federal government's perspective, that they thought was – when this activity would require removal, I think, was unknown at that time. And they may even have had, you know, maybe disagreement among parties as to when it should occur. But I think they wanted to provide the provision for that, yes.

Q. And that's because of this policy that, as white settlement advances, the appropriate government response is to remove the Indians?

A. Well, unless – and I've indicated, and we've mentioned a couple places where there were requests for particular reservations – and I think actually there were some. Bushnell, as I indicated yesterday, suggested some right in the La Pointe area, and I think there may have been a consideration that some Chippewa would perhaps settle there as well.

But I don't think that's inconsistent with the notion that in order to buy time for the Chippewa to be incorporated within the sociopolitical structure that was advancing, that they would be moved to another location where they could have that time.

Q. Now, in the 1842 treaty, the provision for hunting and [X-1285] fishing rights on ceded lands says that the Indians – I don't have the exact language in front of me – but stipulate for the right of hunting, I think, and

the other usual privileges of occupancy until required to remove by the President, or something to that effect. Is that? –

A. I'm not sure exactly about the term "occupancy." I don't have the full quote in here, but it's "required to be removed by the President," yes.

Q. So these privileges or rights, however we refer to them, under this treaty are to continue until removal takes place, is that correct?

A. It's linked in the phrase, to removal.

Q. And is that consistent with how you understand government policy at this point?

A. I think that, yeah, that they would assume that they would be removed from the area. That was the policy. Or, as I indicated before, some other alternative might have been provided, as, in fact, it ultimately was.

Q. But in this particular treaty, the hunting and fishing rights are to last until removal?

A. Well, I think they're tied together here. I guess I'll say that.

Q. Do you think that's different than what the government had in mind in 1837?

A. Well, I guess what you're – I believe that the policy [X-1286] was fairly consistent throughout the period. And the policy was generally to have the Chippewa move to the west side of the Mississippi, and I think it was to gain in the interests, all interests, in those lands and make them available for settlement.

The situation was that it was the timing of when that would be required and when that settlement would occur. So I guess I'm not parsing out these in quite the fashion that you are – put in context.

Q. In your opinion, were the references to removal in the instructions for the 1842 treaty and the provision for removal in the 1842 treaty, were they intended to encompass bands that were residing on lands that had been ceded in 1837?

A. Well, of course, some bands, including the Mille Lacs, signed it. But it was not their land that was ceded.

Q. And was the removal provision intended to apply to those bands who weren't on ceded lands?

A. Well, we've been talking about this, I guess, for an hour now, and I think that the issue of removal was intended to apply to the bands in the '37 area, too.

Q. I'm not talking about the issue of removal. I'm talking about the removal provision in the 1842 treaty.

A. I really think that that would be a legal conclusion as to the lands that were ceded within that. You're asking me –

Q. I'm asking you about your understanding of the intent of [X-1287] the government officials that were involved in the negotiation of this treaty.

A. I think that the intent of the government involved in the '42 treaty was to deal with those bands that were in the '42 unceded areas. But, also, you have to put it in the broader context of what the government was attempting to do, and also in the fact that while the

Chippewa were a separate band, at this particular time – and I talk about it – the government is trying to look at them as a united tribe.

In fact, Stuart says that to the Chippewa in the '42 negotiations, at least the record that we have of it. So when you're asking me what the intent was, I think that was the intent. What does the clause per se apply to, I think, is really a legal conclusion on that agreement.

Q. Well, would you agree that the particular instructions for the '42 treaty didn't really have anything necessarily to do with the '37 treaty? Do you agree with that?

A. I think the instructions were for the lands within the '42 treaty.

Q. And with respect to the treaty provisions themselves, would you agree that they apply to the lands that are referenced in the treaty?

A. Well, again, I think you're looking for a legal interpretation of this. And on the face of any treaty that I've seen, particularly one of cession, the provisions, I [X-1288] wouldn't say, go beyond those ceded lands. But in terms of the policy, which I thought is what you were initially asking me, I don't see it's inconsistent with that.

Q. On page 22 of your report, –

A. Yes.

Q. – in the bottom paragraph, you state that "By 1849, when the government actually wanted to remove the Indians, numerous Lake Superior Chippewa argued against removal." Do you see that?

A. Yes.

Q. And then I read the rest of that paragraph to say that one of the arguments that they made, namely, that the treaty did not provide for removal so long as the Indians were peaceable, isn't supported by the historical record. Is that what you're suggesting?

A. Is or isn't?

Q. Is not.

A. Well, I have an extensive footnote on this, and I refer back to it. It involves the record that we have of that. Actually, I have to make a correction here, too, because the footnote changed with the pagination. That should actually be a reference to footnote 95 now and not 96 on page 22 of my report. I'm speaking of footnote 54. "See discussion below in footnote" – it should read 95, not 96.

But in that explanatory footnote, I discuss when the [X-1289] issue of behavior seems to come up, and it's primarily, I think, around this time. There is one reference to it, and I make that in the note, in the Brunson letter of 1843, where he references a statement by Martin.

Q. All I'm asking is, what is your conclusion on this point? Are you saying that there's some question as to whether the assertion that the Chippewa had been assured they wouldn't be removed as long as they were peaceable, is there some question about the validity of that assertion? Or what's your conclusion on that point?

A. I think that any of the defenses raised as to removal around the period of the 1849 and '50 period, and '51, have to be somewhat viewed in terms of the

opposition from all the parties in Lake Superior to removal. I don't doubt that some Chippewa tied that to the issue of good behavior. But, at the same time, I think it's questionable just how express that linkage was in terms of the federal government.

Q. Well, let's explore that a little bit. One document that supports that is Reverend Hall's letter that we just discussed.

You indicated that the statement in the August 2, 1850 letter, that it was understood that they wouldn't be removed as long as they were peaceable, was a reference to something that happened at the '42 negotiation, is that correct?

A. Yes, I think that's true.

[X-1290] Q. And that was at a time when Reverend Hall was supporting the removal effort?

A. I'm not sure that I would say that he ever really supported – he did support it, but he was also, as I say, somewhat ambivalent also. But I would grant you that at this point he was more supportive of it than perhaps others.

Q. Now, there is a substantial amount of evidence, isn't there, that when the issue of removal was raised in the 1842 treaty negotiations, the Chippewas expressed concern about that?

A. Yes. We have the two records of that that were not contemporaneous. Well, they were at least made available after the negotiations.

Q. And there's also a substantial amount of evidence that they received some kind of assurance from the government negotiator, Robert Stuart, that they wouldn't be removed, and then there's a bunch of formulations, which we're going to talk about. But there's substantial evidence they received some assurances from Stuart, isn't that correct?

A. That it would be some time before the land would be needed, but that he was also providing land for them in that eventuality.

Q. You say in this paragraph on page 22 that there are no contemporaneous records of the Mille Lacs contending that behavior was a criterion for continued residency on the 1837 [X-1291] or 1842 ceded lands. Do you see that?

A. Yes.

Q. Are you aware of a time up to 1855 when the Mille Lacs were told they couldn't remain on ceded lands?

A. As I indicate later on in discussion of Mille Lacs, I don't think that the removal affected them any more than what I had indicated before in terms of the St. Croix and other bands coming there.

There was some discussion later on, about the time of removal, in terms of Watrous and Ramsey, and perhaps others, who weren't sure whether or not they could actually remain at Mille Lacs because of the pressure, eventually of settlement. But I've seen no other document that says they were expressly told that they would have to remove from that area.

Q. Now, I don't want to get hung up on the word "contemporaneous" here, but there is a record within a few months of the time the treaty was signed in which Chippewa do contend that behavior was a criterion for continued residency, isn't that right?

A. I'm trying to remember which document we've gone over. There may be.

Q. Well, let's start with the one you referenced, Agent Brunson's letter from La Pointe, which was written in January of 1843.

A. I'm sorry, I'm getting confused. Are you saying in '37 [X-1292] or '42?

Q. I'm talking about in '42.

A. Oh, okay, I'm sorry. Yes, I'm aware of the Brunson letter.

Q. And that letter includes an attachment which purports to be comments from Chief Marten from the Lac Courte Oreilles Band, is that right?

A. Yes.

Q. Do you recall in those comments Chief Marten says that "I and my brother chiefs refuse to touch the pen unless our half-breed relations were provided for, and we should be permitted to live on the land as long as we behaved well and are peaceable with our grandfather and his white children"?

A. I remember part of that narrative. I don't know if everything is accurate, but I assume that it is.

Q. And do you know, when he referred to his brother chiefs, do you know who he was referring to?

A. I think Marten was a Lac Courte Oreilles. I don't know which other chiefs he would have been specifically referring to.

Q. And that's a roughly contemporaneous indication that the Chippewa thought that they could remain as long as they were well-behaved, is that right?

A. Well, you know, I discuss this again in my footnote 95, and that's the reference to it. So if there's a qualification [X-1293] to that, that would be what I've referenced here.

Q. And what is the qualification?

A. Well, I indicate, in 95, the discussion about the correlation, that we have this one instance here, and yet, you know, we really don't have that many more until the '49 period. There is discussion, obviously, in the '42 agreements in terms of duration or when they would be there, but this issue of behavior and that, I think, is something that evolves over some time.

Q. But it is present in this January, 1843 letter?

A. I've referenced that, yes.

Q. Okay. Now, there's also an attachment to the Brunson letter which has comments from a Chief White Crow. Do you recall that?

A. Yes.

Q. And in those comments, White Crow says that he was very concerned about removal also, is that right?

A. That's right.

Q. There's also a journal of these negotiations that was prepared by Reverend Wheeler and his interpreter, Henry Blatchford, is that correct?

A. That's right. And then there is the one single journal from Stuart that he related at some later date.

Q. That was two years later, is that right?

A. It was two years later in response to some criticism, [X-1294] yes.

Q. And did you review the missionary journal?

A. I've reviewed both of those correspondence at other times. I haven't, you know, referenced them here.

Q. I want to ask you a couple questions about the missionary journal. And if you want to refer to that, that's Plaintiffs' Exhibit 66.

A. Okay. I have it.

Q. First, on page 5 at the end of the second full paragraph, there's a statement from Stuart, "You must not suppose your Great Father is very anxious to buy your lands, and give you each a price for them."

Then he continues in the next paragraph, "The great benefit your Great Father expects to derive from these lands is from the minerals that are on them. Until the lands are wanted you will be permitted to live on them, as you do now." Do you see that?

A. Yes.

Q. And then if you'd turn to page 15 –

A. But you don't want to continue with that, I take it?

Q. Well, you can, if you want to. That's fine.

A. "But when your Great Father wants your lands, he does not wish you to be without a home. He therefore proposes that the lands about Fond du Lac and Sandy Lake be reserved for you. Unless you and your Great Father agree about some other [X-1295] country, and in that case you can agree about it as you please."

Q. Then if you would turn to page 15, there's a statement, "You are to have the privilege of living on your lands to hunt and fish till your Great Father requires you to remove. You understand he does not want the land now. It is only the minerals he wants." Do you see that?

A. Yes.

Q. Now, in these statements, is it fair to say that Stuart was trying to offer some assurances to the Chippewa that the timing of possible removal would be sometime into the future?

A. Yes, I think that's fair.

Q. And also on page 15, doesn't the journal indicate that Chief White Crow was reluctant to sign the treaty, because he was afraid he would be called upon to remove, and that Stuart endeavored to comfort him by the consideration that the land would not probably be wanted during his lifetime? Do you see that?

A. Yes.

Q. And that's another formulation of the assurances that we're going to see later in the period of '49, '50, '51, that they were told they wouldn't have to remove during their lifetimes, is that right?

A. Yeah, but I was talking here about depredations in my report. I don't know if we're – are we off that point? I [X-1296] mean, I do think that there were assurances, and the question of duration was uncertain.

I'm sorry, I guess I was thinking that we were talking about the point in my report about depredations, tying the two together. And that's what I'm uncertain about.

Q. Okay. What I want to talk about is the various formulations of the assurances that the Chippewa received from Commissioner Stuart. One formulation is the good behavior formulation; they wouldn't be removed during good behavior. And we see that in the '43 letter, and then, as we'll talk about in a minute, that's going to reappear in the period of '49, '50, '51, is that right?

A. That's what I've said, yes.

Q. Okay. And another formulation is, they wouldn't be removed during their lifetimes. And that appears in the missionary journal, and it also appears in the later period, is that correct?

A. Yes. I mean, there's a formulation of lifetime. There's also a duration of other years. But that is one expression, that's true.

Q. And when it's used here by Stuart, that also appears to be an attempt to assure the Chippewa that they could remain for some time on these lands?

A. Yes, I think that's true.

Q. And it also confirms that the Chippewa were concerned [X-1297] about this; they were not willing to agree to remove at any time?

A. Well, I can't go that far, because at the same time, as I mentioned back at the beginning of that letter, he doesn't want them to be without a home, and he explains that to them. And this does track very much with Stuart's own account in '44.

So he provides this area for them up in the Fond du Lac area. So, you know, I think it is a question of duration of time.

Q. Well, is there any indication that the Chippewa were satisfied with that provision of land in the Fond du Lac area, and that once Stuart said, "I'm providing this land for you," they said, "Well, that's okay. Then we're prepared to go"? Is there any indication of that?

A. I won't read into the treaty negotiations more than what is here.

THE COURT: We'll recess now for lunch until 1:45. (Noon recess taken)

[X-1298] Afternoon Session
June 24, 1994
1:45 o'clock p.m.

(Appearances as heretofore noted.)

THE COURT: Mr. Slonim?

MR. SLONIM: Thank you, Your Honor.

ALAN NEWELL,

resumed the witness stand and testified further as follows:

CROSS-EXAMINATION (Cont'd.)
BY MR. SLONIM:

Q. Mr. Newell, I want to discuss some of the documents from the 1850s that relate to the assurances the Chippewa might have received from Commissioner Stuart in 1842. Would you turn to Exhibit P-68?

A. Yes, I have it.

Q. This is a letter from Sub-Agent Livermore at La Pointe to Commissioner Brown, dated May 10, 1850, is that correct?

A. That's correct.

Q. This is not a document you cite in your report, is it?

A. I cite some Livermore correspondence, but I don't know if I cite this one or not. I don't see it here right now.

Q. Are you familiar with this letter?

A. I don't remember it. I may have looked at it at some time, but I don't recall it right now.

Q. One of the things that Livermore indicates in this letter [X-1299] is that, from what he can tell as of May of

1850, that there's going to be significant opposition to removal from the Chippewa, is that right?

A. Well, I think that's consistent with other correspondence I've seen from him.

Q. He says that many will be obstinately opposed to going? That's at the beginning of the second paragraph.

A. Obstinately opposed, yes, to going.

Q. And he also then discusses the fact that the Chippewa uniformly seize upon the verbal statements which Mr. Stuart made to them when negotiating the treaty relative to the probability of their being allowed to remain on the lands many years. Do you see that?

A. Yes.

Q. "Many years" is something that he underlined in the original handwritten version of the letter, isn't it?

A. Yes, he did.

Q. And then after "many years," he says, "At least they say until they had received all their annuities, which would be 25 years from the time the treaty was concluded." Is that correct?

A. Yes.

Q. And then he goes on to say that he thinks Mr. Stuart may have given more encouragement of this kind than was prudent, and that he's able to confirm that not so much from what the [X-1300] Chippewa assert, but from the notes taken by a missionary at the time?

A. Yes.

Q. And does this tend to corroborate that the Chippewa received assurances from Stuart about how long they would be able to remain?

A. Well, that it would be a lengthy duration, I think, that's true.

Q. And it indicates that the Chippewa understood that they would remain for many years, which would be at least until the annuities were paid?

A. Well, that's what Livermore is saying.

Q. And he's also saying he was able to corroborate that?

A. Yes. I think he's probably referring to the Blatchford notes. That would be my reading of it, from just looking at it.

Q. If those assurances had, in fact, been given, the issuance of a removal order in 1850 would not have been consistent with them, would it?

A. With assurances?

Q. With the assurances that they could remain at least until their annuities were paid.

A. ell, I guess it's obvious that if you assume that these as rances there and then the removal order is – it's inconsistent, yes, with that.

[X-1301] Q. Let's look at a letter from Cyrus Mendenhall to Commissioner of Indian Affairs Lea, which is dated January 6, 1851. That's Plaintiffs' Exhibit 69. Are you familiar with this letter?

A. Well, again, I think I've looked at some of the Mendenhall correspondence. I've reviewed this letter in the past, yes. I think we had it, again, at the deposition.

Q. Right. This is not a letter, though, that you cite in your report, is it?

A. I don't think I used this Mendenhall correspondence, no.

Q. Now, as part of this document, after the correspondence from Mendenhall, there's an attachment from a Nelson Barnum. Do you see that?

A. Yes.

Q. And this is on page 5 of the typescript, or beginning on the next to last page of the handwritten document. Mr. Barnum says – do you see the paragraph starting "I think they"?

A. Yes.

Q. Okay. In that paragraph, Mr. Barnum states, "They say, too, that they were told that the government only wanted the mineral lands and that they would be permitted to occupy the other lands as long as they behaved well." Do you see that?

A. Yes.

Q. And I noticed, checking the typescript, I think there's supposed to be an asterisk after that sentence – and you can [X-1302] check the handwritten version, if you want – and then there's a subscript from Mendenhall?

A. At the bottom, yes.

Q. Right. And Mr. Mendenhall's subscript says, "Having been present at the treaty of October 4, 1842, I know that this assertion is correct. It was dwelt upon by the Commissioner and illustrated by saying 'the purchase he wishes to make was like buying a pack of furs of one of them, paying for it, and then handing it back, for the Indians own now.' " Do you see that?

A. Yes.

Q. Now, do you know whether Mr. Mendenhall was, in fact, present at the 1842 treaty negotiations?

A. I think he's actually one of the – he's a fur trader, and I think he's one of the individuals listed as having received payments, if I recall right.

Q. Why don't you look at – there's a copy of the treaty at Exhibit P-65. I think he's first listed as a witness to the treaty, is that right?

A. I guess that's right, yes.

Q. Do Mr. Barnum's and Mr. Mendenhall's comments corroborate that at the time the treaty was negotiated the Chippewa were concerned about removal?

A. Well, yes. Again, I mean these are the correspondenc around the 1850s and that, and I think that it's consistent [X-1303] with what I said earlier, yes.

Q. And this particular piece of correspondence tends to corroborate Chief Marten's statement in January of 1843 that the Chippewa could remain as long as they behaved well, is that right?

A. Well, again, you know, I dealt with that in that note, and that's essentially what I've said before, is that

there is in this period of time the letter in '43 attached to Brunson and then this correspondence in '49 and '50.

Q. Would you expect additional correspondence in the intervening period before there was an effort to remove the Chippewa?

A. Well, we have some earlier correspondence, as I've indicated, after the '37 treaty in terms of concern about removal. I don't know. I guess it's hard to say in the absence of what you might find. Again, it's all speculation.

Q. Okay. You didn't find anything following the '42 treaty where the Chippewa were saying, "We understand we can be removed at any time"?

A. Not that I can recall right now.

Q. And did you find any government officials indicating that following the '42 treaty?

A. That what?

Q. That removal could take place right away.

A. Well, of course, there's the annual reports, again, that [X-1304] Hall cites back to and refers to this period in '47, '48. And I guess that's what I could cite for those expressions.

Q. Nothing in '43 or '44 or '45, in that period?

A. I can't recall right now.

Q. And is it fair to say that Mr. Mendenhall believed that the removal order was inconsistent with the assurances that he understood the Chippewa had received at the 1842 treaty?

A. Well, Mendenhall opposed removal. He was one of the individuals along the lakeshore, and, of course, he appears later on in the correspondence on removal And he opposed it. And that's what he's expressing here.

He's expressing what he thought they understood. But, again, I think you have to look at all this correspondence in relation to what people – what their interests are as well.

Q. There's a letter from Silla Treat of the American Board of Commissioners of Foreign Missions to Commissioner Lea on January 21, 1851. And that's cited in your report in footnote – I have it as 93, although it may be 92.

A. It's 92. I have it.

Q. Okay. And did Reverend Wheeler and James Doty concur in the views that were expressed in this letter?

A. Yes.

Q. And Reverend Wheeler was present during the 1842 treaty negotiations?

A. That's correct.

[X-1305] Q. And James Doty was Wisconsin Territorial Governor at the time of those negotiations?

A. That's correct.

Q. On page 2 of the letter, in the paragraph numbered 1, Reverend Treat says, "It was the declared wish of the government when the treaty of 1842 was made to obtain the control of the mineral lands in the possession of the Ojibwes and not to purchase their territory for

agricultural purposes. The Indians were told that they could remain where they were for an indefinite period, except so far as they might be required to give place to miners. And the Commissioner said to them, 'You and I shall never see the day when your Great Father will ask you to remove.' Had it not been for this assurance, it is presumed, the treaty would never have been consummated." Do you see that?

A. Yes.

Q. And does this letter also tend to corroborate that whatever assurances Stuart did provide to the Chippewa regarding removal were very important to them at the time of the treaty?

A. Yes. Well, I reference this at page 36. In fact, I have that quote in there.

Q. Okay. And is it fair to conclude from this that those assurances were essential to making the treaty?

A. Well, that's Treat's opinion at this point. Again, I [X-1306] reference this in the section dealing with the various interests that people had in terms of not having the Chippewa removed. You know, I think that it's a fairly – we've talked about this earlier today – I think that there were assurances made, but that duration was uncertain.

I think it was uncertain on both parties' part. But I think it was also referred to by Stuart, superintendent, that there were additional lands provided for the Chippewa if at some point they were to be removed.

Q. Did the government acquire those lands?

A. They did not acquire them until '54.

Q. And those lands were actually occupied by other bands of Chippewa, weren't they?

A. Yes.

Q. And when the government tried to remove the Chippewa there, there was significant discussion about whether all these additional Chippewa could survive on those lands?

A. Yeah, that's true.

Q. And some of the opposition to the removal effort came from the bands that were actually in occupation of those lands, isn't that right?

A. Yes. I don't recall right now any specific letter to that, but I think that they were concerned about – I think a lot of it's the expressions, through the agents, of the Chippewa who would be removed to get the assurances from [X-1307] parties on lands that were currently occupied that they would be received.

Q. So when you say that the government, at the time of the '42 treaty, provided additional lands for the Chippewa, they really didn't do anything more than say, well, we've identified some lands where there are some other Chippewa bands, and that's where you're going to go?

A. Well, that's true. But in '47 they attempted to make a cession of those lands, too. They failed at doing that.

Q. We'll get to that in just a moment. Now, just before we leave the letter from Treat, does it appear that

Treat believed that the removal order was inconsistent with the assurances that he understood the Chippewa had received?

A. Well, this is what he's saying at this time. This is his opposition to removal. And they raised the issue of the '42 treaty.

Q. Let's look at a letter from William Warren to Minnesota Territory Governor Alexander Ramsey, which happens to be the same day as the letter from Treat, January 21, 1851. And I have it as your footnote 91, although –

A. It's my 90.

Q. And you're familiar with this letter?

A. Yes.

Q. And in this letter, William Warren indicates that he had just met with the Chippewa from the principal villages on the [X-1308] Chippewa River, and then proceeding by way of the Chippewa, Namekagon, St. Croix, and Bois Brule Rivers, met with the Lake Superior bands at Fond du Lac, is that right?

A. Yes.

Q. And were some of the bands that Warren had met with in the 1837 ceded territory?

A. I'm sorry, were some in the 1837 ceded territory?

Q. Correct.

A. I'd have to go back through and look again; I'm sorry, I missed the names. I think some of them were, yes.

Q. And that would include, for example, the bands on the Chippewa River?

A. Yes, they would be.

Q. And those on the St. Croix River?

A. St. Croix, yes.

Q. And does Warren indicate in this letter that there was widespread opposition to removal both from the bands in the 1837 ceded territory as well as those in the 1842 ceded territory?

A. Well, what I discuss in here is the relationship to the 1842 ceded area. He's saying that there's opposition, that's true.

Q. Doesn't he say that – and this is on page 2 of the letter – "Not only in their councils, but throughout the whole length of my journey, I heard in every lodge and from [X-1309] the mouth of every man and woman a determination expressed not to remove"?

A. Yes.

Q. And that would indicate that there was widespread opposition throughout these villages?

A. Yes. I think he goes on to talk about the concern, if I'm not mistaken, in this letter, some of the concerns about where they would be located if removed. And that's part of their opposition, yes.

Q. Doesn't he also say – and, again, this is on page 2 – that "The principal reasons given in their general councils for this determination are, briefly, not only the great natural love of country inherent in the Indians' breast,

but in the apparent misunderstanding which have occurred between this tribe and our government at the treaty of La Pointe, 1842, in concurrence of an article of which the order for removal has been given. At this treaty, the Indians understood the Commissioner to say that" – and this is in quotes – " 'Their Great Father did not want their lands, but the copper abounding in their country.' He also guaranteed to them in words that they would not be removed at any rate during the term of their annuity, and probably never. It was under this verbal understanding, and only this, that the treaty was signed by the Chippewa chiefs. It is firmly engrafted on their minds." Is that a correct reading?

[X-1310] A. Yes, that's correct. And that's what I paraphrased to some degree in my report.

Q. And this also corroborates the statement that the Chippewa believed at the 1842 treaty that they had firm assurances from Stuart that they would not be removed, at least during the term of their annuities?

A. Well, again, there were various terms used, whether it be "annuities" or "duration of lifetime," or we've talked about behavior. So there are various aspects of it, yes.

Q. And this one adds one more; it adds "probably never," is that right?

A. Yes.

Q. And, again, as of – well, how long were the annuities supposed to run under the '42 treaty, do you recall?

A. I'd have to look. I think it was 20 or 25 years.

Q. So there would be, if they ran for 25 years, as of 1850, there's 17 years to go on the annuities, is that right?

A. Yes.

Q. Warren also says – this is on page 3 of the letter – that "No provision has ever been made in any of their treaties contemplating their removal." Do you see that?

A. It doesn't make any sense, of course, but, yes, he says that.

Q. Well, does it make sense with respect to the 1837 treaty?

A. Well, I guess in the sense that it didn't have removal [X-1311] clause, that's true. Of course, I'm not sure exactly what he means by "provision." He may mean also providing some material goods, or whatever, for transport. That may be what he means.

Q. Let's look at a document that records a speech by Chief Hole-in-the-Day on June 30, 1851. And this is our Exhibit 72.

A. I have it.

Q. Are you familiar with this document?

A. I've read it before, yes.

Q. And in this document Hole-in-the-Day is reported to have said that "We are told that this removal is ordered by our Great Father on the strength of the treaty he made with our tribe at La Pointe in 1842." Do you see where I am?

A. Yes.

Q. He goes on to say, "It is written in that treaty that we are to remove at his will from the country we then ceded. It is so written; but I call the Great Spirit to witness that it was not so told to, or understood by us. The Commissioner with whom we treated had been a trader. He got traders to help him. He promised us through them that for at least twenty years we should not be removed, and probably never. He told us that our Great Father had no need of the land but wanted only the copper on it."

And then he continues in the next paragraph, "It was on the strength of this promise, and nothing else, that our [X-1312] chiefs signed the treaty." Do you see that?

A. Yes.

Q. Now, first of all, is he right that Commissioner Stuart had been a trader?

A. He had been a trader earlier.

Q. And does this tend to indicate that Hole-in-the-Day believed that the assurances from Stuart were important to the Indians' agreement to sign the 1842 treaty?

A. Well, on the face of it, that's what he's saying. I think it's another example of these statements from various parties.

But I think you also have to look at it in relationship to Stuart and the difficulties that he had faced in the mid-'40s for the treaty, and also, again, the efforts on the part of individuals at Lake Superior to keep the Chippewa there.

Q. Was Hole-in-the-Day at Lake Superior?

A. No. He was at Gull Lake.

Q. And, I'm sorry, what did the difficulties Stuart faced in the mid-'40s, how does that bear on this?

A. Well, I'm just saying that there was a lot of acrimony against Stuart from Agent Brunson in the mid-'40s. As a matter of fact, Brunson was removed from office sometime during the mid-'40s. And it had to do a lot with, I think, the '42 treaty and payments to half-breeds and a lot of [X-1313] miscellaneous problems.

Q. Do you know whether Brunson was a supporter or opponent of the idea of removing the Chippewa?

A. Well, I think that – I'm trying to remember whether at a later time he supported it, I thought.

Q. Does it appear that Hole-in-the-Day believed that the removal order would violate the assurances that the Chippewa got in 1849?

A. That's what he says here.

Q. And was he concerned with the entire removal effort or just the removal of the bands within the 1842 ceded territory?

A. He's talking about 1842.

Q. Well, on page 2, doesn't he say, "For the past two years, every wind that has blown from the seat of our Great Father has brought us the news that my tribe were to be removed from their old homes on Lake Superior and Wisconsin, and located on the Mississippi"?

A. So since 1848? Yes.

Q. And would that comprehend the 1837 ceded territory as well as the 1842 ceded territory?

A. Well, given that there was anticipation of moving the St. Croix Bands to that area, I guess it would, yes.

Q. Would you look at Plaintiffs' Exhibit 73? This is a letter from Chief Buffalo at La Pointe and other Chippewa chiefs to Commissioner Lea, dated November 6, 1851.

[X-1314] A. Yes.

Q. And are you familiar with that letter?

A. Yes. I've read this before.

Q. That's not a letter that you cite in your report, though, is it?

A. I don't know that I have that in my report.

Q. Do you know whether Chief Buffalo from La Pointe was present at the 1842 treaty negotiations?

A. Yes, he was.

Q. And in this letter in the second paragraph, Chief Buffalo says, "We will now tell you the words of the Commissioner spoken to us when our lands were sold at La Pointe. 'Your Great Father,' he said, 'does not want the land to cultivate, it is only the mineral on it which he wants. The Whites do not wish to come and occupy your country now – until they want it you will be permitted to live and hunt on your land as before. So far as you may live on land which will be wanted by the miners and you

will have to remove to one side; but if you are not in the way of the whites, and live on terms of friendship with them, it will be a great while before you will be required to remove. I don't believe that you or I will ever see the day when you will be troubled about your lands.' He said that we and our children after us might be permitted to live on our lands fifty years or even a hundred if we lived on friendly terms with the whites." Do you see that?

[X-1315] A. Yes.

Q. And does this indicate that Chief Buffalo believed that in 1842 the Chippewa had expressed concerns about removal?

A. Yes. In 1848 I think it does.

Q. Well, he's referring to what happened at the –

A. At the treaty, yes.

Q. And does it also indicate that Chief Buffalo understood that he had received assurances from Stuart that they would not be removed if they lived on terms of friendship with the whites?

A. That's what he says, yes.

Q. And he also says that those assurances were very important to them, is that right?

A. I'm not sure where he says "very important," if I missed something in your reading, but I assume that they are important. You may have interjected that, I don't know.

Q. Does this letter tend to corroborate the account from Chief Marten in 1843 and the account from Barnum and Mendenhall in January of 1851?

A. Well, again, this letter is written in 1851 about those negotiations, and it does bring up the issue of living on friendly terms, which would be concerns with depredations. So he raises that issue, yes.

Q. Did Chief Buffalo and the other chiefs who signed this letter believe that the assurances they had received from [X-1316] Stuart were being honored?

A. Well, they were being required to remove. So clearly they were opposed to that.

Q. And he believed that that was not consistent with the assurances he had gotten in 1842, is that correct?

A. Well, that's what they're saying at this time.

Q. There's a letter from Special Agent Henry Gilbert to Commissioner Manypenny, which was written on December 10, 1853, and cited in your footnote 112, I believe.

A. Yes. I have it.

Q. Are you familiar with that letter?

A. Yes.

Q. Gilbert had been sent to La Pointe to make an annuity payment, is that right?

A. Yes, to make the first annuity payment for a number of years, a few years, at La Pointe.

Q. And on page 2 – this is in the handwritten version at the bottom paragraph – he says that "The Indians

inform me that when the treaty was made, the Commissioner assured them that the clause providing for their removal was only inserted as a mere matter of form, that a compliance with it would never be urged or insisted upon by the government, and that their annuities would always be paid regularly at La Pointe. The interpreter, Mr. Johnson, who officiated on that occasion, was present with me and corroborated their statement. I saw [X-1317] several other persons who were present at that time, and they all concur in saying that without this assurance, the Indians would never have signed the treaty." Do you see that?

A. Yes.

Q. And does this indicate that Gilbert believed he was able to corroborate the Chippewas' account of the 1842 negotiations from non-Indians who were present at the time?

A. Well, that's what he says here. Again, this is after the failure of the removal, the disaster at Sandy Lake, and the change in policy. And I think it has to be viewed in that context. But I agree that's what he says; he confirms that.

Q. And this also tends to corroborate that Stuart's assurances were very important to the Chippewa?

A. Well, he says "the assurances that were given." These letters all strike a similar theme around this period, and this is probably one of the closing letters in anticipation of a new treaty for reservations.

Q. And he says that, without the assurances, that they would never have signed the 1842 treaty?

A. He goes on to say that, yes.

Q. And what he's relaying there is what persons who were present at the treaty informed him, is that right?

A. That's what they were telling them at that time, yes.

Q. And he's also saying that the Chippewa believed that the removal order had violated the assurances they received?

[X-1318] A. Well, I think that's the general tenor of all of these letters.

Q. Now, if we return for a moment to your report and the discussion on page 22, and without focusing on the argument that they were told in 1842, the Chippewa were told that they could stay as long as they behaved well, but instead if we focus on the argument that the removal order violated the assurances that they received from Stuart, isn't it fair to say that there's substantial support in the historic record for their argument?

A. Again, what you're asking me is in terms of what they believed to have been their assurances.

Q. As well as what others indicated was told to them?

A. Well, I think that there's support for the proposition that it was unknown what duration of time that would be. And I think that what the Chippewa notion of time would be would, I think, be different than what the United States notion of that time would be.

It's very difficult, I think, to simply factor out all the other motivations for the parties in the 1850s, or in that 1849-1850-'51 period, in terms of looking at what was understood at that time in '42. But I would agree with you that I think that there were assurances given. But I think it was a question of time.

Now, whether everyone believed that or not, I don't know. [X-1319] I think it's very hard to read into the record that fact. But I think that all of these events have to be taken into account of what's going on in 1850 and '51 with that removal order.

Q. Although that obviously has no bearing on Chief Martin's account in 1843, does it?

A. That is one account, that's true.

Q. And it has no real bearing on the journal compiled by Wheeler and Blatchford in 1842 or '43?

A. No, I think that those journals represent, again, what I'm saying, a duration of time, yes.

Q. Is it also fair to say that the opposition to removal came from bands that were in the 1837 as well as the 1842 ceded area?

A. Yes, although I think that there may have been in some cases less opposition, and I'm not sure exactly why. It's very hard to determine how strong the opposition was at any time. But we know that some St. Croix bands removed.

I believe that at one point Agent Livermore suggested that there might be a difference between the Lake Superior Chippewa and the interior bands. I also think

that certainly by the '52-'53 period, I can see somewhat of a fractionalization, if that's the correct term, between the lakeshore bands and the interior bands as well as those in the Mississippi.

Q. With respect to the St. Croix bands, did they return to [X-1320] their homes after removing?

A. They did come back, that's true.

Q. And is one of the factors that might explain the difference we see in the documentary record between the Lake Superior Bands and some of the interior bands the fact that the Lake Superior bands had non-Indian allies? They had missionaries, traders, miners who were living near them and were willing to help them prepare petitions, help them take delegations to state or territorial capitols, or even to Washington, D. C.?

A. I think that certainly was an advantage for the lakeshore bands, yes.

Q. And it may be that the interior bands were just as opposed to removal, but didn't have the voice that the Lake Superior bands had?

A. I guess that's one possibility. But I still think that lakeshore bands and the interior bands had some split by the 1852-'53 period. And I'm not sure that it has anything to do necessarily with removal, but there were a lot of things that were involved in that.

Q. And William Warren, who visited the interior bands in 1850, in late 1850, believed that there was widespread opposition to removal even among those bands, didn't he?

A. That's what he said, yes.

Q. And Chief Hole-in-the-Day, who lived on the Mississippi, [X-1321] also believed that there was widespread opposition to removal, didn't he?

A. He expressed that in 1851.

Q. Let's turn to the discussion that begins on page 23 of your report of Commissioner Medill and the 1847 treaties. As I understand it, Commissioner Medill advocated the establishment of large Indian colonies where Indians would be removed from the influence of whiskey dealers and other whites who might adversely affect them. Is that a fair shorthand statement?

A. Well, yes, but I think it's broader than that. I think that they were, on the one hand, removing from those types of influences that were not seen as particularly beneficial, and I think also that they were looking – this is a period of time in what historians have looked at as a period of consolidation – and he was looking at developing these colonies, if you will, sort of a pre-reservation period, where Indians could be transformed into agrarian yeomen or simply acculurated into the non-Indian society.

So it's a little more than just removing them from those influences. But that was part of it.

Q. Did Medill envision that, at least for some period of time, the Indians would continue to hunt, fish, and gather for their subsistence?

A. Yes. My footnote 57 on page 24, when he says, and I

* * *

[X-1359] because of their involvement in that economy. And I suspect that he assumed that would continue as well.

Q. Their involvement was by hunting and fishing and supplying products?

A. Fishing probably as much as anything right on the lakeshore, but maybe other activities, too.

Q. Now, in terms of – let's talk about active efforts to remove these bands. Didn't the removal effort essentially end as to all the bands by the end of 1851?

A. Yes. I think it's been referred to as being sort of a passive policy after that with the payment of annuities only in certainly locations. So in that sense I guess it doesn't end, really, but I would agree that for all intents and purposes it has. I say it's moot, and I think that's a point that I would stand by.

Q. How did the Chippewa respond to the passive policy?

A. Well, in my view, I think, they were in quite a vacuum here. On the one hand, they had annuities they believed were due them, but they were not paid where they wanted them to be paid.

And some didn't get annuities as a result; I think others did. I think there's reports of some annuities being paid, but not all.

Q. And didn't most choose not to remove?

A. I think most chose not to remove, yes. Or if they went [X-1360] to get annuities, they came back.

Q. And how long did that policy continue?

A. It was a couple of years.

Q. Well, was it in place in 1853?

A. No. I think when Manypenny comes in in March of '53, we see a change. And Gilbert comes out in September, I think was the first trip out.

Q. So is there anything left of the removal effort at that point?

A. No, I don't think so.

Q. And even as to this passive policy, do you know whether that was ever applied to the Mille Lacs Band?

A. At this point, they, I guess, would have either gotten their annuities at Sandy Lake or in Crow Wing. It wasn't very far distant from where they were.

Q. And those annuities weren't withheld pending their removal, were they?

A. No. As I said before, they didn't remove.

Q. On page 40 of your report, you say that "The controversy surrounding President Taylor's February, 1850 order centered principally on an interpretation of the Chippewa treaty of 1842 and efforts to allow the continued residence of the Lake Superior Chippewa on ceded lands." Is that correct?

A. Yes.

Q. And those are the bands that were the subject of the

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[XI-1391] Morning Session
June 27, 1994
9:15 o'clock a.m.

(Appearances as noted.)

THE COURT: Mr. Slonim?

MR. SLONIM: Thank you, Your Honor.

ALAN NEWELL,

resumed the witness stand and testified further as follows:

CROSS-EXAMINATION (Cont'd.)

BY MR. SLONIM:

Q. Mr. Newell, would you turn to pages 44 and 45 in your report?

A. Yes, I have them.

Q. On those pages you have a discussion of the new reservation policy that was emerging in the 1850s?

A. Yes. It's a brief review of that.

Q. And, as I understand it, it's your testimony that both the 1854 and 1855 Chippewa treaties were representative of this new policy?

A. Yes, I believe so.

Q. Was one purpose of the policy to give Indians secure title to lands within their traditional territories on which they could make permanent homes?

A. Yes, I believe so.

Q. Did government officials at the time expect that Indian [XI-1392] people would continue a seasonal round of hunting, fishing, and gathering, at least for some period of time?

A. Well, I think that – you indicated for some period of time – I think that probably in most of the treaties that I've looked at from this period, that there was a belief that there would be a change in activity, but it would come over time. And that would depend on the particular group of people we're talking about.

Q. Did some of the treaties negotiated under this policy in the mid-1850s contain provisions for off-reservation hunting, fishing, and gathering?

A. Yes. There were usually some conditional provisions, but they were provisions, that's correct.

Q. Is it fair to say generally that government officials did not anticipate at this time that Indians would be restricted to their reservations?

A. Yes, I believe that's true. Of course, there are situations that occurred pretty quickly after this where there may have been some calls for restrictions. But generally I think that that's true. I think the effort to restrict tribal members to reservations is probably a later event, generally.

Q. And wasn't the thrust of the policy at this time more to protect the reservations from incursions by whites than to restrict Indians to a particular area?

A. I think that's generally true. Again, it was to give [XI-1393] them some relief from the pressures that were placed upon them.

I also think, however, that there were inducements to try and keep Indians in particular areas, because, again, we have to look at this in terms of the policy of acculturation and providing agricultural implements and farmers and others who would instruct; also schooling in that.

So there were inducements to do that. But I don't think that – I think that it was important to protect these areas from non-Indian incursions.

Q. Later on in time, there are some treaties that have provisions which restrict Indians to the reservations, aren't there?

A. Yes.

Q. And there are no such provisions in the 1854 or 1855 Chippewa treaties, are there?

A. No.

Q. Beginning on page 46 of your report, you have a discussion of Henry Gilbert's report from the 1853 annuity payment at La Pointe and the events that were leading to the 1854 Chippewa treaty. And, as I understand it, it's your testimony that Henry Gilbert was knowledgeable about the new policy?

A. Yes, I think so. I think that he was aware, as I think that many people were, of the change. And this is an example [XI-1394] of that.

Q. Did Gilbert think that the provision for off-reservation hunting and fishing in the 1854 Chippewa treaty was inconsistent with the new reservation policy?

A. I guess I can only surmise from the fact that it's in there and that he provided it for those – I think it says for those Indians who reside in that area, and that it was, again, conditional, as I've indicated before. But I don't think that he thought it was inconsistent with it.

Q. On page 48 in, I believe it's footnote 116, you refer to one of Commissioner Manypenny's letters of instructions to Gilbert regarding the 1854 treaty. Do I have the right footnote?

A. Well, the explanatory footnote is 116, but it's an ibid. for the previous 115. So I'm sure we're talking about the same instructions.

Q. Okay. And do you recall – and you can get the letter if you'd like – do you recall that in that letter Commissioner Manypenny refers to the importance of extinguishing Indian title to Chippewa country?

A. I don't know if he uses that term, but I indicate in here that the substance of those discussions were acquiring title to all remaining Chippewa lands in Minnesota and Wisconsin. I don't know if the term is "Chippewa country." It may be.

Q. Do you know whether Gilbert thought that the provision [XI-1395] for hunting and fishing in the 1854

treaty compromised the extinguishment of Indian title in that treaty?

A. I don't know. I mean, there is the provision in that treaty for conditional off-reservation. So it's stated in there, and I guess I can only surmise that there was no conflict there.

Q. Do you know whether Gilbert ever said anything to indicate he thought there was a conflict there?

A. No. I haven't seen anything to that effect.

Q. Do you know whether Commissioner Manypenny ever expressed any concerns about the off-reservation hunting and fishing provision in the 1854 treaty?

A. I don't believe he did.

Q. Did you look at the letter Manypenny wrote when he forwarded that treaty to Secretary McClelland?

A. Which one was this?

Q. There's a letter from Manypenny to Secretary McClelland – it's our Exhibit P-136 – in which he forwards the 1854 Chippewa treaty to the Secretary and comments about some of the provisions in the treaty. Do you recall that letter?

A. The only one, I guess, that I've seen is the one in terms of submitting the '55 treaty. I probably have looked at it in the past, but I'm not sure that –

Q. You haven't addressed that letter in your report?

[XI-1396] A. No. My discussion of the '54 treaty is really preliminary to discussing why the Mississippi

Chippewa were left out and then, you know, needed a new treaty in '55.

Q. To your knowledge, was – you've mentioned that the hunting and fishing provision in the '54 treaty was conditional – to your knowledge, was there ever an attempt to revoke that provision?

A. I haven't looked at that, so I don't know.

Q. You don't have any knowledge one way or the other?

A. No.

Q. Was one purpose of the '54 treaty to provide a final resolution to the issue of removal?

A. Yes, I think so – again, within the context of what had happened with the 1850 order. I mean, there are calls for – well, for the '54 treaty, I think it was a resolution of that.

I think with '55, as we've heard last week, there were other discussions later on about moving Mille Lacs Chippewa to White Earth. But I think with regard to the '54 treaty, I think it's fair to say that that was the issue.

Q. On page 50 of your report, you have a discussion about the growth of the population of the Minnesota territory?

A. Yes.

Q. Do you know how many residents there were within the 1837 ceded territory as of 1854?

A. Not specifically within the '37 ceded territory. My [XI-1397] numbers are generally within Minnesota, as I've indicated here.

Q. So do you know how much of the growth that you're discussing here occurred within the 1837 ceded territory?

A. I wouldn't have any figures for that now, no.

Q. Let's move on to the 1855 treaty. Is it fair to characterize the 1855 treaty as a follow-up to the 1854 treaty in the sense that the government had wanted to acquire all of the Chippewas' remaining lands in 1854 and had only been able to acquire a portion of them, and then in 1855 was trying to complete the acquisition?

A. Well, I think it's fair to characterize it in that sense in that they wanted to make the final acquisition of those other lands. I think also in terms of establishing reservations that there's obviously common elements there, and with regard to the allotment policy as well.

Q. In your opinion, did Commissioner Manypenny have the same general objectives in the 1855 treaty as he had for the '54 treaty?

A. I think the federal policy is consistent in that respect. I think that there were specific concerns. I mean, the treaties are different in a lot of respects, the '54 and the '55, and I think they reflect the conditions of the groups that they were treating with, and also where they were treating with them.

[XI-1398] And it also reflects, our understanding of this also reflects, what we have available as a record,

because we have a good journal for the '55; we don't have that for '54.

But, having said that, I do believe that the general thrust of the policy with regards to acquiring the title and with regards to establishing reservations and providing for eventual allotment was the same.

THE COURT: I'm sorry, I'll have to interrupt. I have to make a phone call. I'll be right back.

(Recess taken)

BY MR. SLONIM:

Q. Mr. Newell, beginning on page 52 of your report, you have a discussion of the 1852 treaty negotiations. Do you see that?

A. Yes.

Q. During those negotiations, did the Chippewa express concern that their debts to traders be paid?

A. Yes.

Q. And is it reasonable to conclude from that that the Chippewa wanted to maintain a continuing relationship with the traders?

A. Oh, I think that the traders continued to be important to them. Yes, I think that's true. These were also, I think, past debts as well and obligations that they had.

[XI-1399] Q. And was one of the reasons for making sure those past debts were paid to insure that the relationship could continue in the future?

A. Well, I think that's true. And also, you know, the relationships through some of the traders, like Beaulieu and that who were half-breeds as well, I think that whole intertwined relationship was something that was very important. And these individuals got payments from the '55 treaty. And that was something also that Manypenny was very concerned with, and that's why there's so much discussion about that.

Q. Can we also conclude from this that the Chippewa expected they would continue to trade items that they had previously traded, such as furs and deer hides?

A. I have no reason to suspect they didn't want to continue to do that.

Q. Does Hole-in-the-Day's comment that – let me back up for a second – did the Chippewa also express concerns that the timing of annuity payments not interfere with fall fisheries and other seasonal activities?

A. I think what they were talking about is getting the payments in September, and prior to other activities they had to do to prepare for winter.

Q. And does Hole-in-the Day's comment that they needed time to put away their crops and then attend to their fisheries in [XI-1400] the fall indicate that they thought they could undertake agricultural endeavors and still pursue traditional activities, such as hunting and fishing?

A. Well, I think he still considered that they would continue to fish. That's part of the reason, I think, why the Mille Lacs particularly wanted their reservations where they were at the end of the lake.

Q. And does the comment indicate that any agricultural activities could be undertaken consistent with continuing those types of traditional activities?

A. I don't think it's inconsistent.

Q. Is there any indication in the treaty journal that the Chippewa would be limited by the treaty to hunting, fishing, and trapping on their reservations?

A. There's nothing in the treaty journal that talks about hunting and fishing per se.

Q. Is there anything in the treaty journal that talks about hunting, fishing, and gathering rights under earlier treaties?

A. In the treaty journal? No.

Q. Was there any discussion in the treaty journal of the second sentence of Article I of the treaty?

A. Second sentence of Article I? I mean, I guess I'd have to go back and look at it specifically. Article I is the cession language.

Q. Right. Article I is the language of cession. And if you [XI-1401] want to get it out, you can. But, if you recall, the first sentence is the cession which is defined with boundaries.

The second sentence is the cession of any other lands in the territory of Minnesota or elsewhere. Do you recall any discussion of that provision, that sentence, during the course of the negotiations?

A. I don't think there was any specific discussion on that particular language. And in a lot of the language in

the treaty itself I don't think there's necessarily specific discussion of.

Q. On page 54, you say that "The Mille Lacs Chippewa achieved an important objective by securing a reservation on the southern shore of Lake Mille Lacs." Do you see that?

A. Yes.

Q. Would you agree with the statement that the Mille Lacs chiefs were successful in obtaining a permanent reservation at the south end of the lake, which allowed them to retain their maple trees, access to the vast fish resource in the lake, game in the area, and the rice fields?

A. Well, I think that my conclusion is that principally what they wanted was a permanent home in an area that had been ceded earlier and they needed the fisheries. And we know the ricing areas were terribly important because of the events that we talked about on Friday.

Again, I believe they continued to hunt. And so I don't [XI-1402] think that there's anything that I would know that would be inconsistent with that. I don't know the full range of resources right in that location other than what I've seen in the documents.

Q. And the things that you've just mentioned, fisheries, rice, game, were those all things that were important to the Mille Lacs chiefs at this point?

A. I think they continued to be important. That doesn't mean that there weren't other things that were becoming important as well. But I have no reason to believe they wouldn't continue to do that.

Q. Do you think that the government intended to diminish the rights of the Mille Lacs Band to fish in Mille Lacs Lake by this treaty?

A. Well, I think the government expected they would continue to fish in the lake. "Diminish the rights" – now it's starting to sound like a somewhat legal interpretation, and I'm not sure I'm willing to express an opinion on that. But I think they assumed they would continue to fish.

Q. As I understand it, you did not conclude that the Mille Lacs Chippewa understood the 1855 treaty to affect their rights under the 1837 treaty?

A. Again, I think you're asking for some sort of a legal interpretation. And maybe if you rephrase it, I can –

Q. Well, I'm asking you if you have an opinion with respect [XI-1403] to whether the Mille Lacs understood that this treaty, the 1855 treaty, affected their rights under the 1837 treaty?

A. I don't think there's a discussion of the 1837 treaty. I think the Mille Lacs were principally interested in those resources that I was talking about.

Now, the fact that they continued to hunt off the reservation, I don't know if that's an expression of the 1837 treaty at all. I mean, there's no reason to think that they wouldn't continue to hunt, but they could have done that under any other situation that I would think of at that time anyway.

Q. I want to make sure I understand the answer to the question I asked, though, which is that you have not

concluded that they understood the 1855 treaty to affect their rights under the 1837 treaty?

A. Again, I really think that what you're asking me is for the ultimate legal conclusion in this case. And I guess what I'm saying is that I think in '55, given the events and the pressures that were on them, what they were looking for was a permanent home at the south shore of Mille Lacs. Now, obviously, that was not ceded land.

Q. Let me refer you to your deposition and see whether you agree with the way you answered this question in your deposition. This is on page 648 of the deposition transcript, on line 22 of page 648.

"Question: Do you have any opinion as to whether the [XI-1404] Mille Lacs understood the 1855 treaty to affect hunting, fishing, and gathering rights under the 1837 treaty?

"Answer: It is my opinion that the Mille Lacs were principally interested in obtaining their reservation because of the stresses they were under at that time, and that's what they were concerned about. That's why they wanted to go to Washington, and that's what they got. Beyond that, I can't read anything into the record."

A. I would agree with that.

Q. On page 59 of your report, you state that "In the 1855 treaty, the United States was able to obtain a certainty that the lands outside of the reservation were free from all encumbrances and available to be disposed of as other public domain lands." Do you see that?

A. Yes.

Q. Is there any discussion in your report of the question whether federal officials in 1855 believed that rights to hunt and fish off-reservation were inconsistent with this?

A. No, I don't think that I talk about that in my report in terms of inconsistencies there.

Q. Did you review Commissioner Manypenny's February 23, 1855 letter regarding the 1855 treaty?

A. The transmittal letter? Yes, I've looked at that.

Q. It's not discussed in your report, is it?

A. I don't cite that transmittal. And I think I indicated [XI-1405] that the handwritten version, I hadn't seen the handwritten version, earlier.

Q. That letter discusses the provisions of Article I as well as the other articles of the treaty, doesn't it?

A. Yes, it does.

Q. And there's no reference to hunting, fishing, and gathering rights in that letter, is there?

A. There's no specific reference to hunting and fishing and gathering, no.

MR. SLONIM: Your Honor, that's all the questions I have for this witness. I believe Mr. White has just a few questions.

THE COURT: Yes. I recall from Friday. Mr. White?

CROSS-EXAMINATION

BY MR. WHITE:

Q. Mr. Newell, in your direct testimony, I believe you referred to the Jacksonian removal policy as ambivalent, did you not?

A. There were ambivalent parts to it, yes.

Q. Would you explain what you meant by that?

A. Well, just in the sense that in some of the treaties there were provisions for allotments of land within those ceded areas. At the same time, there was encouragement to remove.

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Driben Cross (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[XI-1543] A. No, I don't consider myself a linguist.

Q. And you wouldn't feel qualified to try to translate English into Chippewa or Chippewa into English, would you?

A. No. When I do my field work, I know words; I know expressions. I can do basic things, but I cannot translate, and I would not be asked to translate.

Q. I want to ask you some questions about the 1837 treaty. And this is discussed primarily in your revitalization report, although there is some mention of it in the Armstrong report. But I'll start with the revitalization report, and I'll let you know when I – there's one reference in the other report.

As I understand your report, and your direct testimony this afternoon, what you've tried to do in the revitalization report is to address what the Chippewa were intending to do in the 1837 treaty, is that correct?

A. That's correct. That's one of the intentions of that paper.

Q. And it's your opinion that for the Chippewa in 1837 living off the land was of paramount importance, is that right?

A. Yes, it was of paramount importance, especially in regard to the formation of their cultural identity, because this is the way men achieved their cultural identity, by being engaged in the chase, so that had they not sought that out in 1837, had they not sought that out, they would have ended up in a [XI-1544] situation where they would have said, well, our identity is no longer important to us through this vehicle. So, yes, they were interested in this.

Q. And, as I understand it, when you use the phrase "living off the land," what you're referring to is hunting, fishing, trapping, and gathering as a way of life?

A. Yes. And when I use the phrase "the chase."

Q. You don't use the phrase "the chase" in the way Mr. Newell suggested some Americans use the word "the chase" to refer to savagery, do you?

A. No, not at all.

Q. Let's talk about the role of women for just a moment. You've mentioned men a couple times. How did women participate in hunting, fishing, trapping, and gathering?

A. Well, sometimes they would produce things themselves. Women could fish. Women could gather rice. Women sometimes could kill animals, although that generally was not their vocation. And, of course, they prepared the skins that were produced by the male.

Their orientation was towards the home. But, of course, they processed the wild things that were produced. So the chase was important to them as well.

Q. And this way of life that centered on hunting, fishing, trapping, and gathering, it was a way of life for women as well as men, wasn't it?

[XI-1545] A. I'm sorry, I didn't hear.

Q. The way of life that you've described that centers on hunting, fishing, trapping, and gathering was a way of life for women as well as for men, wasn't it?

A. Yes. It was a way of life for everybody. In fact, young children were schooled to this from the very earliest times. So, yes, it was a total way of life.

Q. Now, at this time the Chippewa harvested virtually everything on the landscape that they knew about, didn't they?

A. Yes, I would agree with that.

Q. And they harvested goods both for personal consumption and for commerce in the sense that in 1837 they were involved in trade with Europeans, is that right?

A. Yes. And I would use the term with the proviso that we use the term "commerce" there in a common sense term rather than in terms of economics or economic anthropology.

Q. Well, is it fair to use it in the sense that they were involved with trade?

A. Oh, certainly. Yes, it's fair to say that. I'm just saying that we would take commerce in the common sense meaning of the term rather than a technical definition of it. Yes, certainly they were involved in trading goods.

Q. And at the time of the 1837 treaty, they intended to continue these activities using whatever harvesting technologies might become available to them, is that correct?

[XI-1546] A. Certainly. If new harvesting technologies became available to them, they would, of course, embrace them. They embraced the use of firearms. They would embrace any new technology. They were inventors of new technology themselves.

They were never technologically stagnant. Their culture evolved, and their technology evolved along with it. And when they had the opportunity to use new technologies, they would employ the new technologies.

Q. If you would refer to page 18 of your revitalization report for a moment, –

A. Yes, I'm there.

Q. – there's a sentence that begins, "Given the Chippewas' commitment to living off the land, their representatives also made gains." Then you go on to name some of the representatives. Do you see that?

A. Yes, I do.

Q. And the gains that you're referring to there are the provisions of Article V of the treaty, is that right?

A. Yes. In this case, I'm talking about non-economic gains, aside from annuities, and so on. I'm talking about, given their commitment to living off the land, Article V was a gain, I think, from their point of view.

Q. And you're talking about the way Article V appeared in the final version of the treaty, not something

leading up to it during the negotiations. But you're saying that Article V, [XI-1547] in its final form, was a gain that they made made, viewed in light of their commitment to living off the land?

A. Yes. Well, it was a result of the negotiating process, and I think that – yes.

Q. And, in your opinion, Article V was important to satisfy their economic needs, to honor their past, to transmit their culture to their descendents, is that correct?

A. That's correct.

Q. Also on page 18 you have a footnote – this is footnote 41 – where you have a quote from Jeanne Kay. Do you see that?

A. That's correct.

Q. Then you have the statement, "It is my view that Article V of the treaty is best understood in the context of" this statement from Jeanne Kay?

A. Yes.

Q. And "that, as a result, the Chippewa who agreed to the treaty did not acquire an unbounded or unrestricted right to hunt, trap, fish, or gather in the ceded territory by virtue of the article, but rather the prerogative to pursue these endeavors, by whatever means, up to but not beyond the point at which they resulted in the accumulation of wealth"?

A. Yes.

Q. "That is, as the signatories were in the habit of doing when the treaty was signed." Do you see that?

* * *

[XI-1552] interested in accumulating wealth, that they were interested in more than making a bare living?

A. Yes, because they had to meet communal needs. But once those needs were met, if they kept hunting, the danger was that the animal bosses of the species they were pursuing would punish them by inflicting disease on them, say, for instance, congenital dislocation of the hip. Or all sorts of bad things could happen if you abused the animal world, the non-human persons.

So accumulating wealth is not possible in such a system when you have such a philosophy. There's danger out there. There's also benefits, because the more respect you pay to the non-human persons, the more they make their kind available to be killed.

Q. The reference to the '37 treaty in your Armstrong report that I want to ask you about is on the very first page of that report. I wonder if you could turn to that now for just a moment.

On page 1 on footnote 2, you state that the possibility of removal was mentioned in the 1837 treaty negotiations?

A. Yes.

Q. And what are you referring to there?

A. Well, I'm referring to the statement that Dodge made to Flat Mouth, Flat Mouth from Leech Lake. He said, "It will probably be many years before the Great Father will want all [XI-1553] these lands for the use of

his white children." And I'm saying that it's the possibility of removal.

The possibility was discussed, because he's talking about wanting all of the lands for the use of his white children. The implication of that is that the Ojibwe would not have access to these lands.

Q. Did you find any discussion of that in the journal, of what would happen when the Great Father wanted all the lands for the use of his white children?

A. Any further discussion of that?

Q. Right.

A. No. This is the statement that Dodge makes. He does not go on to discuss it further.

Q. And do you have any opinion as to what the Chippewas would have understood in terms of how long "many years" would be?

A. No. I don't think that anybody can come to a reasonable conclusion about the length of time. It is a time. They understand divisions of time. But I think that this statement here, "It will probably be many years," is just that sort of a statement – it will probably be many years.

I don't think they knew how many years it would be. I don't think anybody did.

Q. Are there any other statements in the journal which you believe refer to removal?

[XI-1554] A. Not particularly, no.

Q. Do you recall in the journal that the Chippewa indicated they had 19 villages on the ceded lands?

A. Yes, I recall that.

Q. Is there any indication in the journal that the Chippewa were thinking about abandoning those villages?

A. No, I don't think they were thinking about abandoning their villages in 1837.

Q. There isn't any discussion in the journal about where the Chippewa might be removed to, is there?

A. No. There's no plain talk about removal in the journal.

Q. And there's no discussion about any type of assistance that the United States might provide in the event of removal, is there?

A. No, there's no discussion of that sort in the journal.

Q. And there's also no provision in the 1837 treaty itself in which the Chippewa agree to remove, is there?

A. No, there's no provision in the 1837 treaty to that effect.

Q. Let's go back to your revitalization report for a moment. I want to stay with the 1837 treaty and, in particular, look at the "pleasure of the President" language.

First of all, I think you indicated to Mr. White that you've made a variety of changes to this report since the

version you provided to us at the time of your deposition, is

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[XI-1560] think that's what their intentions were, to seek assurances to live off the land. That was their intention in 1837. And I think I said that in 1987, and I think I'm saying the same thing again today. So I don't think I'm being inconsistent.

I thought you were asking, my interpretation was, would I agree with myself in terms of saying it exactly the same way? I think no, I wouldn't say it exactly the same way. I'm a different person now. I know more now than I did then, and perhaps I would be able to express myself better now.

Q. In your opinion, the Chippewa in 1837 – did the Chippewa in 1837 think that the President would treat them justly?

A. Oh, I think they certainly hoped that he would treat them justly. There is a section in the treaty journal where one of the delegates says to Dodge, "Well, I hope that you will not be as harsh with us as your ancestors were."

But I think that, yes, they hoped the President would treat them justly. Of course, they were making an agreement with the United States.

Q. And, in fact, didn't Governor Dodge assure them on several occasions during the treaty negotiations that the President would treat them justly?

A. Yes, he mentioned this. He said that he wanted them to rest assured that the President would treat them with justice. And Manypenny, of course, made similar statements in 1885, that he was not speaking with forked tongues, as he put it.

[XI-1561] Q. And as far as what the Chippewas thought, are you saying that it was just a hope that they would be treated justly? Or did they believe that they had some assurances the President would treat them justly?

A. Well, they had Dodge's word on it. But I think that – the question of assurances versus hope is an interesting one here. Certainly they had Dodge's assurances. And once you you have those assurances, I think that you hope that those assurances will be honored.

Q. Let me ask you about what you said at the deposition and see whether this is another way to say the same thing. On page 179 of the deposition transcript, the question was: "Did they think the President would treat them justly?

"Answer: I believe they thought the President would treat them justly, yes." Fair statement?

A. Fair statement.

Q. Okay. The Chippewa would not have considered it just if the President told them to stop hunting, fishing, and gathering at a time when the lands covered by the treaty were not being used by American citizens, would they?

A. I'm sorry, I didn't catch the last part. When the lands? –

Q. When the lands covered by the treaty were not being used by American citizens.

A. Would they consider that an injustice?

[XI-1562] Q. Right.

A. I think that from their point of view, they would consider that – given their culture, given their commitment to living off the land, I think that they would consider that injurious behavior towards them, or an injurious action, sure.

Q. Not just treatment?

A. Not just treatment, yes.

Q. Let's move on to the 1855 treaty. Again, this is covered in your revitalization report. In your report, you don't discuss the government's intentions behind the 1855 treaty, do you?

A. No, but I think, as I said when I was being questioned by Ms. Beeman, I think that the government's intentions overall were to acquire lands and resources. As I said, it was a time of nation-building, and I think that this was a concern of the government. They had other concerns as well, certainly.

Q. And I think you indicated that was similar to their concerns in the 1837 treaty?

A. That was a similarity, yes, between 1837 and 1855.

Q. Now, with respect to the Chippewa, once again, you've tried to determine what they were intending to accomplish in the treaty, is that right?

A. That's correct.

Q. And in this case, as I understand it, your focus is on the 16 chiefs who were in Washington and present to sign the

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[XII-1570] Morning Session
June 28, 1994 9:30 o'clock a.m.

(Appearances as noted.)

PAUL DRIBEN,

resumed the witness stand and testified further as follows:

CROSS-EXAMINATION (Cont'd.)

BY MR. SLONIM:

Q. Professor Driben, when we were finishing yesterday afternoon, I believe it was your testimony that the Chippewa chiefs who were in Washington in 1855 intended that their people would continue to hunt, fish, trap, and gather after the treaty, is that right?

A. Yes, I believe they intended that they would do these and other economic – pursue these and other economic opportunities. They wanted them to do this in the same manner as European-Americans that they were aware of.

Q. And I think it was your testimony that this would include hunting, fishing, trapping, and gathering to obtain food to eat?

A. Yes.

Q. And also pursuing these activities to obtain items that could be used in trade?

A. Yes, I believe so.

Q. And also gathering and hunting and fishing to obtain [XII-1571] items that they would want for medicinal purposes or ceremonial purposes?

A. Yes. As I said, there is no mention of that in the treaty journal, but I would suspect that they would still continue to use plants for medicinal purposes and plants for ceremonial purposes.

Q. And then, finally, you also said that they would pursue these activities – and this is something you said was new in 1855 – in order to accumulate wealth?

A. Well, if we're talking about plants for medicine or food, I think that we cannot include that in that category necessarily. But I think that they would pursue activities – while they wanted to pursue these activities; perhaps I can answer it best this way – while they wanted to pursue these activities, they wanted to pursue it with a different philosophy in mind.

They wanted not only to pursue these activities, however, but any and all economic endeavors that European-Americans in their midst were pursuing. And they would pursue those by regarding their natural resources harvests as resources that could be used to generate wealth.

Q. Okay. I'm just focusing on hunting, fishing, trapping, and gathering right now. And one of the things you've said is, in addition to the intention that these

activities be pursued to obtain food and to obtain trade items, that one new [XII-1572] element now is that they would pursue these activities to accumulate wealth?

A. Yes. I believe that that's what they wanted their constituents to do to solve the problems that they were facing at that time.

Q. Now, is it fair to characterize these intentions as an effort by the chiefs to expand economic opportunities for their people?

A. Well, I would say that they were certainly interested. When you say "the chiefs," first of all, I think that you have to look at the leadership here of Hole-in-the-Day, because he's the one that expresses it most clearly and most eloquently, and certainly the most often in the treaty journal, because he dominates the treaty journal, really. And I think that the other chiefs, given their consultation with him, agree that this is the approach that they want to take.

Q. Is it fair to say that what they wanted to do was expand economic opportunities for their people?

A. Yes, I believe so.

Q. Is it also fair to say that the chiefs did not intend to prevent their people from using natural resources?

A. No, they wouldn't prevent them from using natural resources' harvests, because these were valuable economic resources, say, for instance, rice and sugar and furs, certainly.

[XII-1573] Q. And for those of their people who might resist the change they saw and choose to pursue a

traditional way of life, did the chiefs view the treaty as prohibiting those people from continuing to pursue a traditional way of life?

A. I don't think they viewed the treaty as a way to prohibit them. I think what they saw in these negotiations was, again, an opportunity, not so much focusing on the negative or prohibition, but rather focusing on the broader economic sphere, to become integrated into the larger national economy of the day.

There would have to be some restructuring. There would have to be a different philosophy adopted. But to prohibit them from pursuing natural resources, no, I don't think that they would prohibit them.

Q. And they weren't intending to prevent people from hunting or fishing or trapping or gathering?

A. No, certainly not.

Q. If the Chippewa were to be prohibited from hunting or fishing or trapping or gathering at times of the year when they needed these natural resources for food, would that be something that was consistent with what the chiefs had in mind at the time of the treaty?

A. Well, it's difficult to say, because we're looking at a period where we're not talking about prohibitions; we're not talking about prohibitions. But I believe it's fair to say

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[XII-1616] on the basis of their intentions.

BY MR. SLONIM:

Q. On page 20 of your report, you quote a provision, or a portion, of Article IX of the treaty in which the Chippewa stipulate that they will settle down in the peaceful pursuits of life, commence the cultivation of the soil, and appropriate their means to the creation of houses, opening farms, the education of their children, and such other objects of improvement and convenience as are incident to well-regulated society. Do you see that?

A. Yes.

Q. Now, that provision doesn't mean, does it, that the chiefs agreed that their people would stop hunting, fishing, trapping, or gathering, does it?

A. That's correct, it does not mean that.

Q. And as a general proposition, when the Chippewa in the 19th century expressed an interest in farming or in getting assistance from the government with farming or for missionaries, did that signify an intent to abandon hunting, fishing, and trapping as a way of life?

A. As a general proposition or as a specific proposition? The 19th century is 100 years.

Q. As a general proposition, if you have an opinion about that.

A. As a general proposition, I would say that the earlier

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[XII-1625] but, no, I think that they were all terrified of removal. I think it was a tremendous stress for them.

And it's not a question that you can measure in terms of numbers and say these were at level ten and these were at level eight. I think the stress was significant for all of them.

Q. Did the Lake Superior or interior Wisconsin bands intend to abandon the chase in 1854?

A. No, I don't think they intended to abandon the chase in 1854. But if you look at the – their basic concerns in 1854 were different. They did not really – they were concerned with reservations and removal. That was their main concern.

And, of course, there is a clause of the treaty, or a stipulation of the treaty, with regard to living off the land at the discretion of the President.

Q. The concerns with the reservation and removal were also present in 1855, is that right?

A. Yes, I believe so. They were present in 1855, because, as Agent Herriman, who was at the negotiations, mentioned in his correspondence later on, the fear of removal has been eliminated and that these people can finally have a home that they can call their own.

Q. And how about the economic problems? Were the Lake Superior and interior Wisconsin bands facing economic problems?

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Driben Re-Cross (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

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[XII-1694] RECROSS-EXAMINATION

BY MR. SLONIM:

Q. Professor Driben, what was the basis for your statement that the Buffaloheads' book was sponsored by the Mille Lacs Band?

A. That's just my general understanding of it. My understanding is that it was a project that they approved of. It's just a general understanding of it. You know, I didn't recall specifically.

Q. I want to ask you some questions about Defendants' Exhibit 41, which Ms. Beeman asked you about.

A. Yes.

Q. This is the December, 1855 petition?

A. Yes.

Q. This petition isn't cited in your written report, is it?

A. No, it's not.

Q. Who's the person that's identified as being from Mille Lacs?

A. Ne-she-ka-age-mah.

Q. Was he present at the treaty negotiation?

A. Not to my knowledge.

Q. How about the other chiefs that are listed here from Sandy Lake and Pokegama? Were they present at the treaty negotiation?

A. I don't know. I'd have to cross-check.

[XII-1695] Q. Is there any reference to hunting, fishing, and gathering in this petition?

A. No. What they're talking about here, from my point of view, is the code, implementing the code.

Q. And I think it was your testimony that Hole-in-the-Day and the other chiefs intended that the Chippewa would continue to hunt, fish, and gather under the revitalization movement, is that right?

A. Yes. As I said before, they were not interested in closing down economic opportunities. They were interested in expanding them and conducting themselves as European-Americans would in the economic sphere.

Q. And do you see anything in this petition which is inconsistent with an intent to continue hunting, fishing, and gathering activities?

A. No. But it is consistent with the revitalization process, certainly.

Q. And with reference to the passage that Ms. Beeman had you read, do you recall Rebecca Kugel's comments that the Chippewa had different ideas about the changes civilization and agriculture would bring than Americans did? Do you recall that?

A. Yes. We were looking at the period after 1860 and then in a period, I believe in our conversation, in 1882.

Q. And then we also talked about interest in agriculture in

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Squires Direct (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

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[XII-1717] submerged lands policy, and in the southeast – West Coast, sorry, and the southeast. So it was a preliminary attempt to gather the materials and to suggest some of the pitfalls and some of the difficulties that were involved in thinking about using, and controlling the use, of not only the waters, but the submerged lands. I focused particularly on the submerged lands.

Q. If we can perhaps go back to transparency No. 1, you indicate that your report focuses on the land alienation process. Can you describe that process and how that impacted the parties that came to own land in Minnesota?

A. Yes. It was established policy that the federal government would acquire title from Indians, from American Indians, through various land cessions, through various treaties. Once the lands had been acquired through treaty, then these lands would be surveyed, a rectangular grid would be established, and the boundaries of individual tracts of lands that could be then sold or granted or given to various legal entities would be created.

So that we have here, then the flow of land from the American Indians and American Indian title via treaty to the public domain. The public domain, which theoretically, at least, could not be owned by anybody, was

surveyed. And after survey, the lands that were surveyed were made available to various individuals, corporations, and states through what we [XII-1718] call the public auction method.

This is just a shorthand notion that all of the land that was surveyed was available to be acquired by Europeans, or settlers, who were interested in moving into the area. The land then would be in various acreages, 40, 80 120 or 160 acres in Minnesota typically, but not solely, would be sold via one individual. The individual would attend the public auction or subsequently enter the land privately after the auction, would receive what we call a receiver's receipt, and in time, eventually receive a patent.

Corporations were granted – wagon road corporations, railroad corporations, and river improvement companies, canal companies were also granted lands that had been surveyed.

In addition, the federal government gave the right of various states to acquire land that had been surveyed for a whole variety of purposes. The reservation here speaks to a particular grant of land where certain land acreages were reserved to the state for particular purposes.

Q. What was the purpose of conveying title?

A. There were many purposes for conveying title. To talk about a public land policy is a bit of a misnomer, because there were several policies and several ideas behind conveying title to the land. Most people concerned with land alienation would think about 1891 as

being kind of a watershed period, or watershed mark, in the land alienation history.

[XII-1719] From about 1785 to 1891, the idea was to dispose of land in a variety of ways that I'll come back to in a moment. From 1891 to 1935, the idea was that the federal government should reserve land in some way.

And so that 1891, then, becomes the period of time when public lands that we know it today first came to be institutionalized. In 1935, the public domain, as we know it, was closed, and very little land has been sold, particularly in the conterminous United States, since then, although the Bureau of Land Management has sold mineral leases and gas rights.

But if we return to the major period of land sales or land conveyance that went from 1785 to 1891, there were still a number of, if you like, conflicting themes, conflicting purposes. Very early on, the federal government – in fact, most of the 19th century, perhaps – the government was cash poor and land rich.

So they decided the government would convey land to private individuals and to large corporations, to start off with, for money. And so they established various credit sale policies and sale policies whereby the government would sell the land and then put the money into the revenue to pay mostly for the Revolutionary War debt, initially, at least.

Right about 1841, the idea was that perhaps lands would not be used as a source of revenue. Now, these are

* * *

[XII-1722] the early state building. There were a large number of grants that gave specific acreages of land or specific types of land to various states as they came into the Union.

Q. Let's talk briefly about the process of conveying title.

A. As might be expected, Congress enacted a rather elaborate system of conveying title. In 1812, it established what has been generally called the federal real estate agency, the General Land Office, which was the first large bureaucratic endeavor of the federal government, probably. The General Land Office was in charge of looking after both the survey and the sale, or the conveyance, I should say, of all the lands.

The way in which Congress decided, the government decided, that the lands would be sold would be to create what we call a land district. A land district, then, would be the area, the focus of which was a land district office, that would be the place where prospective settlers would come and look at the survey notes – I'll talk about that in a moment – and the place where the land sales would be held. So the land district offices then became the early commercial centers of many of these districts.

At the Land District Office, the prospective settlers would come and look at the information on the land that they might want to buy. They would also attend the public auction that was declared by the President periodically after the lands had been surveyed.

[XII-1723] There the prospective owner, subsequently the owner, would carry out all of the details of acquiring the paper that said that he or she had title to the land.

Q. Perhaps we can go to transparency No. 3, and you can discuss for us, Dr. Squires, the survey of the public domain in Minnesota.

A. One of the key elements in land alienation, or the transfer of land from one person to another, is, of course, the legal description that accompanies the particular land. Here we have here – and, unfortunately, it's not a cumulative graph – here we have the map of the survey of Minnesota between 1847, when the survey crossed the St. Croix River, which is here (indicating), until 1852. The significance of 1852 will be shown on the next slide.

What we have here is the graticule or the reticule that is provided by the actual townships, what's known as the township exterior survey. Typically the survey happened in two contracts. Individuals and their parties – and there were usually three, four, or five people to a party – would be given the contract to lay out the big squares, the townships, the 36-square miles that we now know as the modern township.

So these surveyors would go out and lay this grid on the ground. And they would be followed by the people that did the interiors, what we call the subdivision of the township, the [XII-1724] sections, and even further subdivisions below the section.

So the big graticule, then, the open graticule, refers to the township exterior, and the black refers to the subdivision. And all you see is the year-by-year advance of the

survey. I could have made it cumulative, and perhaps I should have done that.

(Indicating) Here's 1847. There was very little surveying done in 1848. By 1849, the survey graticule had reached the south end of Mille Lacs, and the subdivisions had reached up to the St. Croix River.

By 1850, the subdivisions were moving up the Mississippi. By 1851, we had – and I think this is part of the Rum River, and I think these are the Kettle and Snake Rivers, although I haven't really done that detailed analysis in the particular area, and here we have, in 1852, further up the Mississippi River.

Q. Now, so the record is clear, this is Figure 11 from your report. And the darkened areas are the areas that have been –

A. – subdivided. Can I have the next overhead? So by 1852, then, we have a patent survey in Minnesota. Again, the graticule – here we have, then, the exterior lines of the survey, reached the southern end of Mille Lacs.

The subdivisions were rather – subdivision surveys were rather scattered. Now, the importance of this is that only [XII-1725] those areas that have been subdivided were available for sale. So in a sense, then, none of these areas that hadn't been subdivided would be available for sale or declared for sale by the President.

This diagram shows that in 1852-1853 this survey expanded across the Mississippi into the southeastern part of Minnesota subsequent to the Dakota treaties of cessions of 1851. You can see that in 1854, again, the

survey expanded very rapidly, both the exteriors and the subdivisions, the southern part of Minnesota.

By 1855, subdivisions had reached, at least in that diagram, near Mille Lacs. And, by 1857, the survey had leapt ahead, so to speak, to the north shore of Lake Superior. This just gives a chronology of a five-year period.

The significance of this is that all of the surveys up to this 1857 period were administered by the Surveyor General of Wisconsin, Iowa and Dubuque. After 1857, Minnesota was its own surveying district and had its own Surveyor General.

Q. Again for the record, this is Figure 12 from your report. And the darkened areas, again, show the areas, but this time cumulative – is that correct, Dr. Squires? –

A. That's correct, yes.

Q. – that have been subdivided and were therefore available for sale?

A. That's correct.

[XII-1726] Q. Let's discuss, then, Dr. Squires, the sale of the public domain in Minnesota. We can go to transparency 5, which is Figure 17 from your report.

A. Before I turn to Minnesota exactly, let me just mention briefly the overall picture, because Minnesota cannot be considered in isolation. Minnesota was one area where land was being surveyed and land for sale. There were other areas.

This is an overall diagram that goes from 1800 all the way to 1943 and covers the whole period that is known as

the land alienation period. Many authors have talked about the closing of the public domain, as I mentioned, in 1935.

What this shows is, it talks about various individual pieces of legislation that set certain conditions on how land could be acquired. I won't go into most of those.

But what you can see is a series of peaks and depressions that correspond to the sale of more or less any commodity. Land was a particularly valuable commodity, but it shows peaks and valleys, peaks when people were buying a lot of land and valleys when the people were buying little land.

It also corresponds, as other experts have shown, that the 1837 depression comes out quite – this is a period of time when people didn't have any money; therefore, no land was being sold. And it's quite interesting that Congress, at that bottom period, creates a piece of legislation that allows more land to be sold.

[XII-1727] So Congress was clearly looking at selling the lands as a means of moving people out westwards. And when no land was being sold, they enacted legislation to, in a sense, open the valve of lands. 1857 depression, low – the land sales shows up quite clearly, too.

(Indicating) This is the panic of 1857, it's been called in Minnesota, entirely brought on by land speculation, or so people have argued. But this is just a general picture. If we can have the next one, I've got Minnesota in more detail, the top diagram there.

Again, Minnesota shows the same peaks and valleys, although to a lesser extent because the scale is somewhat

different. The period that I focused most importantly for my testimony goes from 1850 or 1840, 1845, to 1854, when a large number of lands were being sold by cash, including military bounty. The statistics make no distinction, the statistics that I used.

So a large number of people were coming into Minnesota and acquiring land. That's the main point of that.

Q. Dr. Squires, before we leave that graph, there is, starting just after 1860, there begins a line in the middle of nowhere that isn't colored underneath. What's the significance of that?

A. That is the line that shows the original homestead entries. As I said before, 1862 was when the Homestead Act [XII-1728] was passed. A large part of parts of Minnesota were already owned by somebody when the Homestead Act was enacted in 1862.

These graphs, again, are cumulative. So that there is the total amount of land that was acquired under the homestead and under cash. Later on in Minnesota, the Timber Culture Act was passed and becomes important, and timber and stone in 1891. So this is just a general summary diagram that describes the time series of how people acquired land.

The bottom diagram is a summation of how title to Minnesota's public domain was conveyed – in other words, how the federal government conveyed title to Minnesota to various people and to corporations and to the state. And you can see, then, to individuals were large numbers of lands sold under whole variety of statutes. Some historians estimate that there were 3,500 statutes

passed by Congress between 1785 and 1935 of a temporary or a permanent, of a local, of a general nature that related to land alienation.

12.8 million acres in Minnesota were selected by railroad companies either from the federal government or from state government here; here I just have the federal government figures. Seventeen-million acres were reserved or were given to Minnesota or selected by Minnesota.

In addition to this, we have about 1.2 million acres that the federal government retained, always has had, and I think we have 700,000 acres of Indian lands. I do believe that's

* * *

[XII-1730] they would turn around and sell those lands to finance, or to refinance, I should say, their line, because their line had to be built before they could acquire title to the land.

But often railroad companies would mortgage the lands they owned to raise capital to build a line. These lands, I think, came when the Lake Superior Mississippi Railroad Company went bankrupt. The railroad was acquired by the St. Paul & Duluth Railroad Company, who created, I think, the Western Land Association to sell all these lands that they owned.

But this is a picture of just the sorts of patents that were created by the federal government in their attempt to colonize and provide incentive for people to move to, in this particular case, Minnesota.

Q. Did this type of grant put the railroad companies in competition with the federal government as a land seller?

A. Yes, it did indeed. In fact, there were a whole variety of people in competition with the federal government. The federal government would be competed by landowners, who would acquire more land than they wanted and turn around and sell it. And corporations – in fact, they were in competition with the state as well. So there were a whole variety of people from which individuals could acquire land.

Q. Perhaps we can focus on the public lands of Minnesota, and if we can go to transparency No. 8, which is Figure 22

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[XIII-1746] Morning Session
July 5, 1994
9:15 o'clock a.m.

(Appearances as noted.)

THE COURT: Good morning.

MR. THOMPSON: Good morning, Your Honor.

RODERICK SQUIRES,

resumed the witness stand and testified further as follows:

DIRECT EXAMINATION (Cont'd.)

BY MR. THOMPSON:

Q. Dr. Squires, when we left off last week, we were talking about the colored map showing the various land-ownerships that had been published by the DNR. I'd like to return briefly, if I could, with you, Dr. Squires, to the focus of the report. Can you tell us again what the focus of your report is?

A. Well, I was trying to put the Indian treaties, in particular the 1837 treaty and in particular the land cession contained in that treaty, into a broader historical perspective, one that addressed what I thought was kind of the dominant theme in 19th century America, and that was the transfer of land from the federal government to state, corporations, and private individuals, the so-called land alienation process. At the same time, I addressed, in part the spread of governments that facilitated the spread of landownership.

[XIII-1747] Q. What was the concept – and I know you touched on this briefly – what was the concept of public landownership at a national level in the mid-1800s?

A. Well, there really was very little of it. The federal government retained ownership of certain public sites for public buildings, for courthouses, for customs immigration, for lighthouses, for example, and even some cemeteries. But really the whole thrust of the federal government's land policy, if you'd like to call it that, was to convey title from themselves to other legal entities.

So there really was no public land – there was a public domain, as many historians have pointed out – but the institution of public lands, as we now know it, really wasn't created until the latter part of the 19th century, even though Yosemite National Park and Yellowstone National Park were early examples of what later became part of the federal public lands.

So until the President was authorized to set aside forest reserves in 1891, there really was no national policy of retaining lands in public ownership other than the scattered sites for governmental purposes.

Q. Let's look at the state of Minnesota. What was the concept with regard to the state of Minnesota owning public land in the mid-1800s?

A. Well, Minnesota, like other states, followed the same [XIII-1748] sort of process as the federal government when they received land under various federal land grant statutes that I described briefly last week. The whole intent of Minnesota was to convey title to railroad corporations, for example, and to other private legal entities.

The first state law that seemed to intimate that we would have some public land in Minnesota, again, was 1891 when Itasca State Park was created from some of the land the State then owned.

Q. When, in your opinion, marked the end of the era of the public domain?

A. The public domain was closed, as many people have pointed out, in 1935 with the passage of the Taylor Grazing Act. At that point in time, the General Land

Office and the Grazing Service were combined to form what is now known as the Bureau of Land Management. At that time, the Bureau of Land Management was given jurisdiction over all of the public domain lands that were still, in a sense, available for private entry.

And this, of course, doesn't include the national forests and the national parks and various other national land management units that were already in existence. So the Bureau of Land Management then became custodian of all of the public domain outside of those land management units.

Q. What was the significance in Minnesota of the 1854 [XIII-1749] Preemption Act?

A. As I said last time, there was some consensus that people that settled in advance of the survey or in advance of settlement should be rewarded. In 1841, this notion of isolated people settling in front of the advancing wave of settlement should be rewarded, and they were given preemption rights. But preemption rights only gave them the right to settle on surveyed lands, and the right was that they should be given first choice to own the lands when they've been surveyed.

In 1854, individuals were allowed to settle on unsurveyed land in Minnesota, and Oregon and Washington, I believe, but I wouldn't be sure on the latter two. So for the first time, then, it seems, the individuals got certain ownership interests, if you like, the right to buy land, even though the land on which they settled hadn't been surveyed.

They had to declare that they were going to settle on the land and have some improvements in the certificate they had to file with the local land office.

Q. In your testimony last week, I believe you mentioned that there were approximately 3500 land statutes passed. What time frame was that?

A. Well, a number of people – and I can't give you a citation – there were a number of compilations of landlords throughout the 19th century, particularly towards the end. [XIII-1750] And some scholars have estimated 3500 statutes of a general and permanent nature, or of local and temporary nature, from 1785 to 1935.

Q. In your view, was the land alienation process from 1785 to 1935 politicized?

A. Oh, yes, tremendously so. It couldn't help being so because of the tremendous sums of money to be made from the land, not only by the government, but also by the individual and the railroad corporation.

It was politicized in a number of ways. First of all, the President was empowered to appoint many of the key players, the surveyors general, the commissioner of the general land office, the land district offices receiving the register. He was empowered to appoint those.

And it's quite noticeable that once every four years these offices changed. And certainly historians have talked about this political patronage. The general land office or land district office's job was regarded as a political plum, as indeed was the surveyor general.

A number of people – certainly one master's thesis that I've seen – suggested that President Lincoln in actual

fact got in – I think he was President in 1861 – because of issues that had to do with land on the western frontier in Minnesota and states like that. So it was part of the political patronage system that was set up in the 19th [XIII-1751] century.

Q. Are there any ways other than what you've discussed that the President was involved in this land alienation process?

A. The President was given extraordinary powers to change land district offices. Initially, Congress established the land district, which was the area to be sold at a particular office.

The President was given the power to establish the land office at the particular place that he deemed important or fit, and he also was given the power to move those from one place to the other within the land district. He could consolidate land districts; he could abolish land districts. He couldn't create them. Only Congress could create them.

The President had the power to proclaim lands for sale, although the proclamations that were issued were usually signed sometimes by him, but more often by the Secretary of the Interior, who was the commissioner of the general land office's boss. The President also withdrew lands from sale. So the president was given enormous power in the land alienation process.

Q. How were the reservations, boundaries of Indian reservations, surveyed?

A. The reservation boundaries were separate. They were not considered part of the public land survey system in the strict sense of the word. They were handled under specific contracts [XIII-1752] to individuals until, I believe, about 1860, when they were handled by the general land office and the Bureau of Indian Affairs, or the Office of Indian Affairs, whatever it was called at that point in time. Subsequently they became just the purview of the general land office, I believe.

Q. You have used the term "public record" in your report. What do you mean in your report when you talk about the public record with reference to land titling?

A. Well, I'm merely referring to all of the materials typically filed in county courthouses and that are used by those that are interested in tracing the history of ownership of a particular tract of land, such as real estate lawyers or abstractors – all of the material, then, that is readily accessible and would appear typically on an abstract.

Q. What was the view in the mid-1800s of the patent and its relationship to ownership?

A. I believe that the patent transferred full, complete, what we would say fee simple absolute, perhaps now title, to the legal entity that acquired a patent.

Q. If the privilege of hunting, fishing, and gathering wild rice that was granted in the 1837 treaty survived the 1850 executive order, what, in your opinion, was the effect on that privilege of the survey and sale?

A. It is my opinion that when the lands were surveyed and sold, those privileges became extinguished. It

is [XIII-1753] inconceivable to me that they would be allowed to exist on lands that are privately owned.

Q. What is your opinion on the effect on the privilege of transfers of land ownership from the federal government to state government?

A. In my opinion, it's exactly the same as that from the federal government to private individual. The state took title from the federal government through an approved list, and subsequently, in many instances, particularly in the southern part of the state, transferred land to private individuals or to railroad corporations.

In doing so, the state issued a patent to the railroad corporations and to private individuals. In my opinion, that patent carried the same sort of warranties, implied warranties, that the federal government patent carried to individuals. So, hence, the state acquired fee simple title without restrictions.

Q. In your opinion, did the 1837 privilege grant a right of use of the land?

A. Yes, because it granted the right of hunting, fishing, and gathering wild rice in and on the lands. It's very difficult to not see that as a land use.

Q. Did the 1837 privilege grant a right of access?

A. Again, the language "hunting, fishing, and gathering wild rice upon the land," it seems to me it carries implied access, [XIII-1754] if not direct access. It's very difficult to fish and hunt upon the land if you can't get upon the land.

Q. In your opinion, was the 1837 privilege to hunt, fish, and gather wild rice an interest in or to land?

A. Yes, I believe so.

Q. Can you tell us, Dr. Squires, in your view, what the linkage was between federal land policy and federal Indian policy?

A. Federal land policy, or the title conveyance from the federal government to the legal entities I've described, really fueled American economic development throughout the 19th century. It drove federal Indian policy. It drove transportation policy.

In many instances, the federal land policy actually drove the immigration policy, because it was responsible for huge migrations from eastern and western Europe into the United States. So it's my opinion that the federal land policy drove federal Indian policy.

MR. THOMPSON: Thank you. No further questions.

THE COURT: Anybody over at this table have any questions for Dr. Squires?

MR. SZOTKOWSKI: No questions, Your Honor.

THE COURT: Mr. Arum?

* * *

[XIII-1759] occupancy in the 1837 area. They were just granted use rights, hunting and fishing. Do you disagree with that now?

A. Well, as I said before, there is no mention of occupancy, nor is there mention of use.

Q. Now, on page 61 of your report, you say that the Indian privileges of hunting, fishing, and gathering that was part of Indian ownership were clearly regarded as inconsistent with non-Indian ownership characterized by more sedentary land use practices.

Now, is it your belief that the purpose of the executive order was to eliminate the conflict between Indian use and non-Indian use of the ceded territory?

A. No. My opinion is that the executive order of 1850 was designed to remove the temporary privileges of hunting, fishing, and gathering wild rice in the 1837 ceded area.

Q. Well, do you recall in your deposition saying that that was your opinion?

A. Can you give me a page number, please?

Q. Starting on page 249, line 16, I asked you the question: "Is it your contention that that was the purpose of the 1850 executive order, to eliminate the conflict between Indian occupancy and use and non-Indian occupancy and use?" And on line 20 you said, "That is my opinion."

A. I think, on reflection, one would have put in perhaps the word "potential," potential conflict.

* * *

[XIII-1778] Q. Was there any land, according to your diagram, that had been surveyed and subdivided within at least two townships of Mille Lacs Lake at the end of 1854?

A. Not according to this map.

Q. Each township was six miles across?

A. Yes, that's correct.

Q. The Gorman letter refers to lands seven miles south of the extreme southern line of the Indian boundary. Would there have been any surveyed and subdivided land within seven miles of the northern boundary of the 1837 ceded territory?

A. According to my map, only the area on the extreme eastern part of the area around the Mississippi.

Q. That would have been the extreme western part?

A. Sorry, yes.

Q. And that would have been a long way from the Rum River?

A. It would be a way away. It wouldn't be a long way away.

Q. It would certainly be far more than seven miles from the Rum River?

A. That's correct.

Q. Is it possible that Gorman was incorrect that the lands had been surveyed and sold?

A. It is entirely possible.

Q. Would you have expected, in the six weeks that intervened between the end of 1854 and the February 16, 1855 letter, that lands would have been surveyed and sold in a six-week period?

[XIII-1779] A. No. It's very unusual to presume that it would happen that fast. Normally it was six months to

a year between survey and sale, and normally the sales were in the fall, very rarely in winter or spring.

MR. THOMPSON: No further questions.

THE COURT: Anything further, Mr. Arum?

MR. ARUM: No questions, Your Honor.

THE COURT: You're excused, Dr. Squires.

MR. SZOTKOWSKI: Your Honor, may I just have a few questions?

THE COURT: Oh, Yes, go ahead.

REDIRECT EXAMINATION

BY MR. SZOTKOWSKI:

Q. Good morning, Dr. Squires.

A. Good morning.

Q. Dr. Squires, if I understand your direct testimony that you were giving this morning, your opinion is that with respect to the survey and sale of the lands within the 1837 ceded territory, that that would extinguish the privileges that were granted under the 1837 treaty, is that correct?

A. That's my opinion.

(Document handed to witness.)

Q. With reference to Defendants' Exhibit No. 12, it's an opinion of the Attorney General of the United States. Dr.

* * *

[XIII-1782] And Mr. Squires' direct testimony also went to whether or not the privileges were conditional under the '37 treaty and whether or not the United States government would have been able to take actions to extinguish those at some point or if the condition could be resolved by settlement of the territory. And I think that that was both touched on in Dr. Squires' direct examination and Mr. Arum's cross-examination.

THE COURT: As I understand it right now, what you've asked him to do is to read this into the record?

MR. SZOTKOWSKI: That's right, Your Honor.

THE COURT: Go ahead.

A. "Sir: In answer to the questions proposed in the letter of the Commissioner of Indian Affairs and referred to me by your communications of the 23rd ultimo, I have the honor to inform you that, in my opinion, the 13th article of the treaty of March, 1836 with the Ottawa and Chippewa Indians by which 'the Indians stipulate for the right of hunting on the lands ceded with the other usual privileges of occupancy until the land is required for settlement' must be regarded as reserving the use of the ceded land for all the purposes of Indian occupancy as it existed prior to the treaty until such lands shall have been actually disposed of to individuals by the United States. Such disposition may be made by sale under the general laws or by special grants, or in any other way that [XIII-1783] Congress may direct. And whenever an actual disposition of any particular tract shall be made, the unsufructuary right of the Indians will cease as to such tract. In the meantime, however, that right cannot

lawfully be interrupted by the government, still less by any citizen of the United States. I am, sir, very respectfully your obedient servant, B. F. Butler." And it was addressed to the Honorable J. R. Poinsett, Secretary of War.

BY MR. SZOTKOWSKI:

Q. Dr. Squires, would it be your opinion that that analysis by the United States government supports your analysis of whether or not treaty privileges could be conditional and could be later extinguished by settlement?

A. That would be my opinion.

MR. SZOTKOWSKI: No further questions, Your Honor.

THE COURT: Mr. Arum?

MR. ARUM: No questions, Your Honor.

THE COURT: Now you're excused, Dr. Squires.

(Witness excused)

MR. FROEHLE: Your Honor, the Landowners Call Dr. Donovan Hofsommer.

* * *

Squires Cross (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[XIII-1755] CROSS-EXAMINATION

BY MR. ARUM:

Q. Good morning, Dr. Squires.

A. Good morning.

Q. Now, Dr. Squires, as I understand it, you consider yourself an expert in land use geography, is that correct?

A. I'm not sure about land use geography. The historical aspects of land ownership would be more truthful, perhaps.

Q. But you don't consider yourself a professional historian, do you?

A. No, I do not.

Q. And you've never done any research into the history of Indian/white relations in Minnesota?

A. No, I have not.

Q. And you don't consider yourself an expert in the development of federal Indian policy?

A. No, I do not.

Q. You don't consider yourself an expert in the Chippewa language, culture or history?

A. No, I do not.

Q. And you have no formal training as a legal scholar?

A. No, I have not.

Q. I take it that, although you have some expertise in land use, you don't know much about Indian land use matters, is that right?

[XIII-1756] A. No, I don't.

Q. What was the topic of your dissertation?

A. My undergraduate dissertation or my graduate dissertation?

Q. Your graduate dissertation.

A. It was on vegetational history.

Q. What do you mean by vegetational history?

A. The history of vegetation in northern England, a part of northern England.

Q. What kind of research did you do in order to learn about vegetation history?

A. The technique that I employed is one that's well-known in biological and geological circles. It's palynology, which is a long jargon term for counting pollen grains.

Q. I'd like to ask you about the research you did for your report. Outside of your prior research in the area of

public lands and land ownership, did you do any additional research for your report?

A. I looked at the materials that I've been gathering over a course of ten, twelve years, checking my sources for the specific questions that I thought were important in this research. I perhaps gathered other information, but certainly it was not a major component of my report, going out and gathering additional information. I had most of the information that I used in the report already available to me [XIII-1757] in my files.

Q. Are any of the opinions in your report based on the primary source documents that were produced by the Band and the State in this case?

A. No.

Q. On page 60 of your report, you say that the removal order revoked the privileges of hunting, fishing, and gathering. Now, you've read the 1837 treaty, I take it?

A. I have read the parts that I was concerned with, which is the land cession part.

Q. But you would agree that the 1837 treaty is silent about the issue of removal?

A. Yes. It's completely silent about removal.

Q. And, from what you can see, there's no agreement on the part of the Indians in that treaty to remove?

A. I haven't read the other parts of the – I read the other parts of the treaty, but I can't give an opinion on what they agreed to do and not to do.

Q. Would you agree with the statement that under the 1837 treaty the Chippewa reserved no rights of occupancy in the 1837 ceded territory, but, rather, they were just granted use rights for the purpose of hunting and fishing?

A. I have no idea about occupancy and use the way you phrase it. All I read is that they ceded the land and were given the privileges, the temporary privileges, of hunting, fishing, and

* * *

Hofsommer Direct (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[XIII-1789] A. No, I'm not, but I'm aware of Indian policy by way of my work in the American West and elsewhere.

Q. And you're not an expert on what the Indians understood various treaties to mean in this lawsuit?

A. I am not.

Q. How, then, does your overview of the American experience help put this lawsuit in historical context?

A. Well, we don't know who we are unless we know who we have been. We don't know who we are unless we know our roots. And the American experience is complex, and this issue is complex. And one needs to understand the issues before this Court in a broad general context.

Q. When you talk about the American experience, are you going to describe various aspects of the common man in America and what their mind-set was?

A. I can.

Q. Did you prepare a written report for this case?

A. I did.

Q. And did you prepare an amended report, correcting typographical errors?

A. I did.

Q. And do you adopt and offer that report as your direct testimony in this lawsuit?

A. I do.

Q. When people came West, when Minnesota was the West in the [XIII-1790] 1830s and 1850s, did these settlers and other westward migrant people, who would be shopkeepers and small businessmen, did they bring values, attitudes, or any mind-set which arose out of the New England area?

A. Well, by indirection they did. Any time you have a movement of people, you have simultaneously the movement of ideas, ideals, customs, traditions, values, intellectual baggage, as it were. I don't know that you could say directly out of New England, because obviously those who came from the British Isles brought with them their customs, traditions, values, and so on, to New England.

It seems to me that much of the American character is writ large in new England; not that it's distinctly different in South Carolina, as an example, but these traditions are writ large.

The Puritans come to mind here, to illustrate the point. These were persons who were dissatisfied with the progress made in the reformation of the Church of England. In their opinion, it was not going fast enough; it was not going far enough.

They concluded, at least some of them concluded, that they ought to remove from the British Isles, come to part of the British Empire, the claim in North America.

They did this. They did so with a task, with the belief, that they had a special task, that they were a special people at a special [XIII-1791] time, and that special task was to purify the Church of England.

They arrogated to themselves a notion here that they were on a divine mission. As Perry Miller, the historian, wrote, they were on an errand into the wilderness. An errand – it's a task, it's a duty, it's an assignment. You can't get away from it. And where? Into the wilderness. And that wilderness was in British North America.

But the purpose was to purify the Church of England. In their frame of reference, in their minds, this was a duty, a task, that they could not fail in. It was inspired by God. And you couldn't let God down, as it were.

The point is, ultimately, that they failed in the sense of purifying the Church of England. But that concept, that they were a special people, at a special place, at a special time, for a special purpose, that continued and expanded and became a part of the American culture and the American character, it seems to me.

Q. Was part of that mind-set involved with the use of land?

A. Yes, yes. As it developed, land was central to their thinking, as it would be central to the British North American thinking generally. As it happened, in the northern colonies land was more broadly dispersed, whereas in Carolina and in what would become New York, land was not dispersed widely, but was held by a few.

[XIII-1792] But the concept remained the same. And that concept was that you were perceived to have a stake in society if you had land ownership – land ownership, as opposed to ownership of other elements.

Q. Did they have any view about the active versus passive use of land?

A. Yes. They did perceive that it was important – that is to say, one of God's great gifts; now we're using the new England frame of reference again, the Puritans – that God had given a great gift to them in land and that God expected much from them, and in this case much from the use of that land. And it would have to be an active use of the land.

Q. Now, you talked about the view of them being a special people at a special place. Were some of these values or attitudes good for the country in any way?

A. Well, yes, I think so. I think perhaps to illustrate this, an excursion through the early American wars might be useful. For instance, by 1775, a significant segment of these British North Americans decided that their government was not adequate, that their government was not treating them properly and appropriately.

And thus they sought redress. That came to the shots heard round the world in April of 1775. By the Fourth of July – actually, the 2nd of July – 1776, these persons were perfectly willing to go to the next step, an incredible step, [XIII-1793] to declare their independence.

These people had to feel themselves superior. They had to feel good about themselves to take on this incredible task. It was, certainly from the British point of view, a revolution. It was indeed a revolt.

The fact that these ragamuffins could ultimately best the most powerful nation on the face of the globe, wasn't that, they wondered rhetorically, wasn't that proof, you see, of what they had thought all along, that they were a special people, at a special place, at a special time, for a special purpose? And, to continue on with that line, the preamble of the Constitution speaks to great things and to great optimism.

The Declaration and the Constitution were beacons seen round the world, symbols of enlightenment, symbols of progress, symbols of liberal progressive reform, as it were – no question about that. The fact that these same people a generation later, or a little more, would fight the British again – and they thought victorious, but actually it was about a draw – wasn't that again the proof positive, you see, that they were a special people?

And in the 1840s, the Mexican War, in which the United States was victorious over Mexico, didn't this seem to show, if you want to look at it from a theological point of view, a divine blessing?

Even the Civil War, the worst war in the history of the [XIII-1794] American people, was a war in which the forces of right, quote, unquote, prevailed. In fact, the slaves were freed. In fact, slaves were given citizenship rights and the right to vote in the Fifteenth Amendment.

And, lastly, in the 19th century, the war in 1898, a war with the Spanisn in which we ultimately became imperial power, a contradiction in some American terms, I grant, but didn't this, didn't all of this, and didn't World War I, where we came in on the winning side, and Americans thought they had tilted the balance of power – remember the songs of the time, you know, when the Yanks get here, then it will be over shortly, was the essence of it.

And, finally, it's worth remembering that on V-J Day, 1945, the mushroom clouds over Hiroshima and Nagasaki were perceived by that generation of Americans as symbols of greatness, as symbols of superiority, symbols of right.

So I say, in answer to your question, that if you go to these kinds of conflicts, you have to arm yourself morally. You have to feel that your are [sic] surrounded by a moral rectitude. You have to feel good about your cause, as it were.

Q. Now, don't you think that some might find some of the values and attitudes you've discussed, and some you'll discuss later, to be certainly different from today's standards and perhaps even offensive by today's standards?

[XIII-1795] A. Well, history's like the garbage can. History doesn't have any choice about what it receives.

Yes, in answer to your question, I think the American experience is a mixed bag. I don't think that that could be surprising. There's much about our record that's admirable; there are elements of our record that are not admirable.

The historian's task is to take two yardsticks to his work, the yardstick value of the time you're studying and the yardstick of today. Those are two different yardsticks, and they will yield different measurements.

We need to understand what motivated the American people at a particular time as opposed to what motivates them now. What informs them now could be very different from what informed them then.

An easy example, and one that intrigues me, is business ethics. Certainly the ethical standards in business of the late 19th century are different from the business ethics of today. For that matter, insider trading, as it occurred maybe two decades ago, today is illegal.

This is a moving picture, as it were. Ethical standards change. Again, it's terribly important to take two yardsticks to historical work, the yardstick value of the past as well as the yardstick value of the present.

Q. I take it that by using these two yardsticks, that's part of what you think is gained by looking at the ethics, values, [XIII-1796] and expectations of 19th century Americans for this lawsuit?

A. Well, we need to understand the context, and we need to understand the perspective. My perspective is from the Euro-American view. It's not the only perspective. It's the perspective that I'm bringing to this investigation.

Q. I believe you mentioned the westward migration was not just a physical movement of people, but a movement of ideas and customs. What were some of the values or ideas that moved west as people moved west?

A. Well, coming out of New England and out of the old middle colonies or old middle states, one that I think of that's useful in the Minnesota context is the value of education. If you drive across Ohio, you'll notice that practically every county seat town has a college or university.

That's not by accident. That reflects the values of those people who came out of the middle states, and particularly the New England states, a value of education.

Another one that comes that same route through the Great Lakes chain has to do with slavery. And those who came from those areas across to this part of the world typically – not exclusively, but typically – brought with them a belief that slavery ought not to expand.

Now, that's an important concept that I'm going to come back to. You see, expansion is implied. They didn't want slavery to expand into the territories, and the territories [XIII-1797] were in the West. Those are two examples.

They brought with them typically also the concept of the family farm, that central to this would be land, and that land would be privately held. Those are three examples.

Q. Now, what kind of country did the founding fathers see as far as how it would be set up when they were looking ahead at the end of the 18th century?

A. That's a mixed bag. The Hamiltonians feared the little guy, and the Jeffersonians feared the big guy, to use it in kind of a common parlance.

Let's look at Jefferson. Jefferson, the great intellectual, dreamed, devoutly hoped for, a nation of small farmers and small shopkeepers. He might have put it differently, small entrepreneurs. He implicitly worried about bigness, whereas Hamilton implicitly favored bigness.

But Jefferson had this dream of a nation of small farmers and small shopkeepers, and behind that was the notion, the historic American notion, that those who had a stake in society, those who had a stake in society, were those who had land property. In New England, land was broadly held, whereas, as I mentioned earlier, not the same case in the southern colonies.

Jefferson bought into that dream. And so he hoped that in the American West there would be an abundant opportunity for that. As a consequence, in 1802 – he was President by [XIII-1798] then – in 1802, three-eighths of U. S. commerce drained through New Orleans, down the Ohio and Mississippi. And when the French impeded that flow of commerce, he did send ministers to France for the purpose of trying to see if they could buy New Orleans for the United States.

What happened, as every school boy knows or school girl knows, is that the ministers got a big surprise. They were offered the totality of what we would call the Louisiana Purchase, a gigantic expanse from the Mississippi River to the crest of the Rockies.

Jefferson, the strict constructionist, knew that there was no provision in the Constitution for land expansion, but he was willing to overlook that, you see, because his greater goal for the country was this liebenstraum, this

living room, this area into which the American people could spill over the next decades, or even centuries, perhaps. It would then make for the United States his dream come true, a dream of small shopkeepers and small businessmen who would have a stake in society, as defined in the traditional way.

Q. This Jeffersonian ideal, a country of small farmers and small shopkeepers with a stake in society, during the first half of the 19th century, did this become an overriding or overarching policy or goal of the United States?

A. Well, the overarching goal was to settle up the West as quickly as possible. How to do that was the question. The [XIII-1799] United States of America, unlike today, I guess, didn't have a whole lot of money. And the question then became, as a matter of national policy, how could the federal government help?

And about the only way it could was to create federal law that would be advantageous, or to somehow involve the public domain in ways that would expedite this process. So the overarching goal, it seems to me, was settle up the country as quickly as possible.

Q. Was that and containment of slavery the issues of the day?

A. Well, what had happened before 1861, but especially in the decade of the 1850s, was this raging national debate over whether slavery ought expand. It really was not so much an issue of whether slavery was good or bad or ought to be extinguished, but rather the debate centered on whether this institution ought to expand or not.

And, as you might guess, in this part of the world, the views were mixed, but primarily that it ought not to expand; whereas if the context were, let's say, Memphis, Tennessee, the notion was, yes, it should.

Q. Was Indian policy at all related to this settle-the-West-as-soon-as-possible goal?

A. It was, but it was subsidiary. The primary, again, was to settle the West as quickly as possible. And, as a result, you can't divorce Indian policy from that, but it was [XIII-1800] subsidiary.

Q. Did the Jefferson ideal come to pass?

A. Well, it did for lots of people, for sure. I think it's fair to remember that there were a number of motivating factors that propelled people to the West. There were those who came with great expectation and great idealism, but I think it's fair to say that there were charlatans among them also.

Q. How did President Jackson affect the westward migration and settlement of the West, which included Minnesota at this time? Am I right on that?

A. Well, Jackson is the first American President who might be called apart from the disinterested elites. There was a notion abroad the country in the late 18th century and into the next century, a notion that the French may have styled noblesse oblige, the obligation of the nobility. What happened was, then, this notion that if you were well-blessed, well-talented, it was your obligation to government service, to public service.

That is going to pass some in the 19th century, unfortunately. But, at the same time, you have a very different

kind of tradition evolving, and that's the tradition of the common man. After all, there were more and more of them, these common persons. They were not restricted to the West, by any means.

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[XIII-1806] Q. You mentioned that the policy grew harsher. At the time, how did the common man view this Jacksonian Indian policy?

A. Well, if we had the assets of Gallup polling, I think we would have found that the average American believed this to be an appropriate policy.

Q. Did they feel it was related to their mission or destiny, in a way?

A. Yes. I'd like to back up for just a moment. I wouldn't want to leave the impression that every American felt this way. But, on average, the average American, it seems to me, did buy into, accept, and perhaps even admire the harsh positions of the Jackson and Van Buren administrations. Now, in all that, I've forgotten your question.

Q. I think you answered my question. How did the government policy towards Indian relate to or reflect the common view of the average person?

A. Well, Oliver Wendell Holmes, Jr. would, years later, say that law is the outcome of social views, and I certainly would use that definition here; that what you see in the administration and execution of the law from the Executive Department reflects what the average American thought.

Q. What did the common person, the average American, think of the Declaration of Independence and the Preamble to the Constitution, which you mentioned early as beacons of hope to the world? How did the common person view them?

* * *

[XIII-1812] it?

A. Well, increasingly, the common man, as it were, viewed the public domain as land owned by the citizenry of the United States with the federal government as its agent. And, as a consequence, the common man thought nothing of squatting on the land, literally using it illegally, because, insofar as he was concerned, it was not an illegal use of the land. The land was his as a citizen of the United States.

What happens, as the number of these people will increase, is, they become a very powerful political constituency. Remember that, by 1840, at least a third, and maybe two-fifths, of the American people lived west of the Appalachian chain. And they're Westerners; they're vocal – Westerners tend to be – Westerners, and became a powerful political force.

Q. Did government do anything to recognize the xpectations of these people as they're settling illegally?

A. Well, in probably popular parlance, the land laws were changed to quick, easy, and cheap. And that reflected the views and values of these Westerners. They wanted it available quickly; they wanted it available cheaply. What they really were saying, they wanted it free.

Q. Was there any debate initially amongst government officials as far as how the public domain was to be parceled out?

[XIII-1813] A. One of the many issues that the first Congress had to wrestle with in New York City in 1789 was, how are we going to pay the bills? There was, in 1789, a tremendous reluctance on the part of the American people to pay taxes.

Well, faced with that political reality, they had to look around for alternate ways of raising money, one of which was a duty on imports, but that could only go so far. And what the government did have, of course, was a gigantic chunk of land, a gigantic chunk of real estate, that could be sold.

Not surprisingly, Alexander Hamilton, the first Secretary of the Treasury, counseled a policy that would bring in cash very quickly. And, to do that, he counseled the policy that would divide the public domain into substantial chunks, large chunks, that then could be sold quickly, which would bring the government immediate cash flow.

Others said, no, that's an inappropriate policy. What we need to do is subdivide the public domain as there is need for it, as there is call for it. Eventually, this will dovetail, as it were, with the Jeffersonian view, land of small farmers and shopkeepers.

That was another way of saying, let's have an expeditious land policy that divides this in smaller units. And, finally, of course, in 1862, beyond the scope of this investigation, you have the Homestead Act.

Q. Now, you discussed the Louisiana Purchase, which opened a [XIII-1814] large tract of land, and I believe you said the Mexican War did the same. How did the Mexican War affect, or reflect, the mind-set of Westerners about them being a special people with a special purpose?

A. For every war there has to be a justification, or, if you wish, a rationalization. In defense of the American war against Mexico in the mid-1840s, there was this general notion that had infected the American psyche and that is what I've referred to earlier as "a special people, at a special place, at a special time, for a special purpose."

The average American – there were certainly those who did not favor this war, I readily admit – but the average American supported it. The average American took the position that Mexico and Mexican citizens would not use the land as well as Americans would; that Mexicans were more likely to use the land in a passive, rather than an active, way.

This is broadly remembered as the thinking and spirit of Manifest Destiny. And that's a kind of shorthand term for what I've been saying, we are a special people, at a special time, at a special time, for a special purpose. In other words, it is destiny.

Americans were motivated by duty, mission, and destiny – duty, mission, and destiny. Destiny you can't argue with. It's going to happen.

And so these Americans were essentially saying that it is [XIII-1815] the destiny of the American people to

sweep from sea to shining sea and, perhaps more importantly, to take with them their beneficent institutions, capitalism, democracy, and Christianity.

Q. It sounds like you're saying that the Americans –

A. And whether you justify this on the basis of some kind of theological understanding, or if you buy into what would very shortly be called social Darwinism, destiny – it's going to happen.

Q. Could anything stop it from happening?

A. No. And, incidentally, nothing should. And I think there's the important part, because, you see, if you have this duty, this obligation, this destiny, anything that stands in your way can be mowed down morally.

Q. Now, these views of the Westerners and people in Minnesota, were they reflected in government policy at all?

A. Oh, yes. It's Oliver Wendell Holmes, Jr. again. Law is the outcome of social views.

Q. Do you think the government tried to meet the expectations of the average American concerning settlement of the West?

A. Meet the expectations? Yes.

Q. Now, you mentioned the attitude of the Euro-Americans towards Mexicans and a passive use of land. Was there any similarity in that attitude that the Euro-American settlers [XIII-1816] had towards Indians' use of land?

A. First cousins, for sure.

Q. As the line on the frontier moved westward, was it pretty much a straight line where you have settlement filled in in a line, or was it common that there would be pockets as the frontier jumps ahead?

A. It was a very irregular pattern, a very jagged pattern. We can do this, I think, by looking at statehood. The first state following the 13 was Vermont; well, that's a logical extension of New Hampshire, somebody might say.

But when the next two come in, Tennessee and Kentucky, that thrusts states way out to the Mississippi. Above that area – Ohio, 1803; Indiana, 1816; Illinois, 1818 – you see it's a very irregular pattern.

Jumping across the Mississippi River – Louisiana doesn't count, because it comes into the United States as a state in 1812 really because of political considerations regarding the war – the first state that would follow a normal westering process is Missouri, as a consequence of the Missouri Compromise of 1820 and '21.

But it would be Arkansas following just to the south; it would be that long, you see, before Arkansas would come in next. And, above Missouri, Iowa would not come in until 1846; Minnesota, 1858.

So it's a very irregular, it's a very jagged, pattern. [XIII-1817] And we've forgotten in this Michigan, which sort of lies off that east-west path, as it were. So there would be that filling-in process and, within a state, the same kind of pattern.

Q. Now, this pattern, you said, within a state, does that mean that there would be an irregular leaps and

bounds of settlement and population within smaller geographical areas of a state?

A. Yes, it would be an irregular pattern, unless there's some kind of exception. For instance, in Wisconsin, there would be mineral deposits around Mineral Point in the southwestern part that would change that calculus some. But typically it would be this rather frontal attack in a jagged sort of pattern.

Q. Would it be fair to say that a variety of factors can affect the scope and direction of settlement and population and development of a geographical area in a state?

A. Yes, that's fair.

Q. And it wouldn't be at all uncommon for certain pockets to be left?

A. That's fair.

Q. Now, when you look at the process of the Northwest Territories and how the states became developed out of that, is there any additional description as to the pattern that that process took which might implicate how Minnesota became a [XIII-1818] state?

A. Among other things, the Northwest Ordinance does set up the apparatus, the mechanics, for bringing in states to the Union with co-equal power, co-equal status. That happened. There were five, and six if you count Minnesota, which there was a little bit of present-day Minnesota in that Northwest Territory.

The process was there. It was a process by which determination for statehood would be made on a variety of reasons, one of which was population; that in this

period, a period of tutelage, as it was called, preparation for statehood, the people there would design a prospective constitution and get ready for statehood.

That was the apparatus that was used variously. There are exceptions to this policy. Texas, California, are exceptions to it. But Minnesota certainly reflected that pattern.

Q. Were there any elements of that pattern which would have been apparent to government negotiators or government officials in 1837?

A. Well, it was simply a matter of time. And, by that, I mean it was simply a matter of time before territorial status would be accorded and, following that, statehood. It was just a matter of time before this calculus would be at work.

Q. What lured people to Minnesota in the 1830s through [XIII-1819] 1850s? Do you know why they came here?

A. Well, I suspect that people came for any number of reasons, which would be typical of the American westering experience. One of those reasons might be to make a reputation for oneself. It might be to get away from one's reputation. It might be because you just feel hemmed in; you just can't stand the neighbors.

It might be to come out here and get rich somehow or another. It might be – most likely, most likely, it was the opportunity to get land. And land was always the greatest of the various indices – but opportunity to do something, principally opportunity to get land.

Q. Now, isn't it true that in 1837, and even during the 1840s, that the forces of settlement, the small shopkeepers, the farmers, the industrialists, were not very heavily populated at all in the 1837 ceded area?

A. No. Perhaps you'd rephrase that question.

Q. Isn't it true in 1837 that there weren't a lot of farmers or shopkeepers in the 1837 ceded area?

A. I think that's easily fair.

Q. How, then, would the treaty negotiators in 1837 have any idea that the area would become heavily populated or settled?

A. Well, they weren't ignorant of the forces that had been at work and were continuing in this work, that is to say, this gradual, evolutionary movement from east to west. After all, [XIII-1820] we've looked at the states of the Northwest Territory. Michigan would very shortly become a state. In other words, that movement on an east-west axis is coming closer.

In 1837, I think you'd have to conclude it's simply a matter of time before those forces are going to turn around the bend of Lake Michigan and point northwestward into the present states of Wisconsin and Minnesota. It was just a matter of time.

Q. Did anything happen in –

A. For instance, keep in mind, St. Louis has developed by this time, a substantial city. Chicago is little more than an onion patch. But in 1848 there's a railroad that's going to be built west out of Chicago even before there's a railroad from the east. It's just a matter of time.

Q. Did events occur in the 1840s which might have affected the pace of when the area would become heavily populated?

A. Well, one event in the decade preceding this is worthy of mention. That's the panic of 1837, a distinct depression, a four-year-long depression, that slowed the process. It didn't stop it, by any means; it slowed the process. That is an important factor, I think, that we need to remember.

But, to answer your question directly, the 1840s, in my opinion, represents a watershed period in the Minnesota experience. Certainly as the decade begins, you have continuation of the traditional, the long-term economy, the [XIII-1821] barter economy of trapping and trading.

But at the same time, at the same time, you have clear predictors of change. For instance, 1839, you have the first sawmill at Marine on the St. Croix. That's close.

Now, that sawmill implies much. It implies that somebody is willing to risk capital to build that mill and to bring a labor force out to work in that mill, to cut the trees, move the trees, mill those trees into lumber, because there's a market that's close enough to sustain, on a profitable basis, that mill.

Again, it's just a matter of time. There's a market close enough to justify, on an economic basis, construction of that mill. That implies much.

Father Galtier will bless the Basilica at St. Paul in that decade; the first Post Office in what would become the state at St. Paul at mid-decade; regular – and I think this is the most important of all – regular packet service on

the Mississippi River; in other words, regularly scheduled steamboat service. And that means, again, there's an adequacy of demand to sustain regularized, periodic, scheduled service on the Mississippi. That says a great deal.

And, lastly – again, a tremendous symbol of permanence – the first logs are milled at St. Anthony Falls in the last part of that decade.

So it's a watershed period. Minnesota is going to be [XIII-1822] terribly different at the end of the decade from what it was beginning that decade.

Q. Do you think government negotiators with the Indians in 1837 could have anticipated the pace, the rapid pace, in which the State and the 1837 ceded area would become settled and populated?

A. Well, they had some clue, but my general response is no. For instance, no one, to my knowledge, in the 1830s in the United States was talking about a transcontinental railway line. But it was the talk of the decade in the 1840s.

In other words, I don't think in the 1830s you could anticipate the rapidity, the speed, of change that's going to occur because of advanced transportation technology. I don't think they would have had that kind of insight, and I'm convinced they did not. It just happened so much faster than anyone would have guessed.

Q. Now, when people came into this state, settlers, small shopkeepers, what expectations, values, or attitudes about Indians did they bring with them?

A. These persons came in in descending numerical order from the established middle states, principally New York, Pennsylvania; they came from nearby states, Illinois, later Wisconsin, Iowa; and, thirdly, from the New England states; and lastly they were European immigrants in terms of descending numerical order. In all cases, these are persons [XIII-1823] who came from areas in which there was no, quote, Indian problem, end quote. If there had been a problem wherever they came from, it was long since extinguished.

And if they were Americans come now west to this part of the world, they came with the expectation that either the, quote, Indian problem, end quote, was taken care of or shortly would be taken care of.

Q. When you talk about the "Indian problem," what particular conflict are you describing?

A. Well, for lack of a better description, the incompatibility of the hunt with agriculture. And obviously this is not an issue with a lumber interest, but the lumber interests simply represented chapter one in a very long book, chapter two of which would be pursuit of the agriculturalists.

It's worth remembering that in this part of the American experience, the thinking was that if the soil could grow a good tree, it could grow a good crop. In fact, it was implicit evidence that you could practice agriculture there.

So back to the hunt – the chase, as it were – was incompatible with agriculture, which is sedentary.

Q. Was the way in which the government would solve this Indian problem, or this conflict in land use, in flux in the late 1840s or early 1850s?

A. It was in flux, I suppose for a variety of reasons, one of which was that there were those who argued that the policy [XIII-1824] of removal was not a good one, not an appropriate one.

And others may have said, well, we may have made a mistake out there in the heartland of our country, long labeled the Great American Desert. Maybe it's not a desert at all. Maybe that area out there also has potential for agriculture. Maybe we'd better rethink this policy of removal.

Q. What was the practical attitude or view towards land ownership held by Westerners coming into Minnesota during this first half of the 19th century?

A. Well, simply that it was theirs to use, to control, to do with as they saw fit. Later on, Vanderbilt, the great railroad man, was confronted by a critic who questioned the way he was running his railroad. And he said – expletive deleted – "It's mine. Can't I do with it what I want?"

And I suspect that the average Minnesotan felt very much the same way, "This property is mine. I'll do with it what I want." That certainly was in keeping with the laissez-faire mentality of that century.

Q. Was there any government regulation on land use which was starting to take shape as a government policy?

A. Incompatible with laissez-faire economics.

Q. Do you think the attitude of a landowner, that they could do what they wanted with their land, do you think they would have believed that their rights to control land would be

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[XIII-1827] what we would apply today?

A. That's right.

Q. Considering the values, attitudes, expectations of the average American that you've described, as reflected in government policy during the first half of the 19th century, would government, the United States government, ever have intended that privileges or rights to use land would have been given to an Indian group which would be in any way superior to land use rights of European-Americans?

A. Inconceivable.

Q. Considering the same factors, do you believe the government would have ever intended that any privilege or right to use land could, under any set of circumstances – excuse me, let me withdraw the question and back up.

Considering the same factors, would government ever have intended to give an Indian group privileges or rights to use land which could, under any set of circumstances, affect the ability of a private landowner to control the use, or abilities of others to use, his land?

A. Not likely.

Q. Again considering the same values and attitudes you've discussed, do you believe the federal government would have ever intended to give any special rights of

access to Indian groups which would be superior or interfere with the landowner's ability to control use or access over his land?

[XIII-1828] A. Most unlikely.

Q. Is this part of the reasoning why you believe the hunting and fishing rights granted under the 1837 treaty are temporary?

A. Yes, and especially given the decade in which this happened. In the 1830s, with President Jackson and President Van Buren occupiers of the White House, and reflecting, as I think they did, the average American values, I can't see it any other way.

Q. Do you think the government ever would have granted hunting and fishing rights or privileges in a treaty where the government would have given the Indian group indirect control as to when any treaty privileges or rights would end?

A. Most unlikely.

Q. Do you think the government would have ever given any rights to hunt and fish which were superior in any way to European-Americans to an Indian group where those rights could last forever?

A. I doubt it.

Q. Do you know, during the 1830s, '40s, through the mid-1850s, do you know whether there was any government plan, view, or ideas about somehow reconciling the life of the chase with the agrarian farmer, small shopkeeper, country that was being created?

A. Only perhaps on a reservation.

[XIII-1829] Q. Was there anything unusual, from all of your knowledge and experience, in the way that Minnesota became settled, populated, a territory and a state?

A. No. I think the Minnesota experience is typical of the American westering experience and the process of territorial status and statehood.

Q. Now, you've been talking about the American westering experience. Isn't that one of the areas of your specialty where you teach an upper graduate level course?

A. My primary area in my doctoral work is in the American West, particularly in business history in the American West. And, yes, I do teach an upper division and graduate level course on the American West at St. Cloud State.

Q. Do you really believe that the Westerners who settled and came into Minnesota in the first half of the 19th century and shortly after believed they were a special people, with a special purpose, at a special time, and that it was their mission to make the land productive, as they viewed it?

A. I do.

Q. Do you think the United States government took actions to further those views and attitudes of Westerners during the first half of the 19th century?

A. It was, again, the government's purpose to quicken the pace, to settle the West as quickly as possible, wherever that West was. It was a great national goal. As I

think I [XIII-1830] mentioned, lands were given in support of private turnpike companies.

Lands out of the public domain were given over to states in support of canal construction; later on, of course, the great grant of land to states and to others for the purpose of expanding railroad transportation. Ultimately, roughly ten percent of U. S. rail lines were built with land grant support.

Q. I believe you mentioned earlier about the various wars the United States has been in and how they had to arm themselves with moral fiber or some aspect. Do you think the settlers and the government felt that they were carrying out their mission as far as settling the continent in the way they conducted themselves with Indians and populated the areas, including the state of Minnesota?

A. One more time, please.

Q. Sure. You talked about the view of a just war. For example, you discussed the War of Mexico. I'm asking, based on the mind-set values and attitudes of the people of the time that you've set forth, do you feel that they felt justified in their mission and purpose when engaging in conduct with Indians which caused separation of the Indians so that the agrarian society could take hold?

A. Yes. The average American took to this question a sense of superiority.

[XIII-1831] Q. And although we may look back with hindsight now, would our yardstick be much different from what the yardstick was in the middle of the 19th century?

A. I don't want to speculate on the current yardstick. I will say again, it's important to understand all this in the context of the time, and to recognize the value system, the traditions, the attitudes of these people in their time.

Q. And does that help us uncover what the government's intent was at that time as well?

A. In my opinion, if you look at one, you see the other. It's a mirrored reflection.

MR. FROEHLE: No further questions at this time, Your Honor.

THE COURT: Okay. Are there any other questions from that table?

MR. SZOTKOWSKI: Just a few, Your Honor, from the State.

THE COURT: Okay. I think we'll recess until 1:30, and then we'll start with you.

(Noon recess taken)

* * *

[XIII-1836] highways, the Mississippi on the one end and the Red on the other.

Q. In your analysis of the settlement that did take place with regard to growth of Minnesota as a territory and then later as a state, did you base that analysis on some type of straight population definition that you would have looked to to find out if settlement had taken place?

A. I think the generally accepted figures are roughly 4,000 non-Indian population at the time of territorial status in 1849 and 150,000 in the year of statehood. That, on a real number basis, is not dramatic, but on a pro rata, on a percentage basis, that is incredible growth in a very short period of time. And a great part of that is the result of transportation technology.

Q. And would you look to other indicators as far as whether or not settlement was indeed taking place? What other indicators would there be?

A. My rule of thumb definition here would be anything that states permanence. For instance, the Pike Expedition of 1805-1806, in which the United States flag was presented in this part of the world, is an implied statement of permanence. Nothing is implied in the construction and manning of Snelling, Fort Snelling. That's clearly a statement of permanence.

The first post office in St. Paul, the first land office

* * *

[XIII-1845] other words, there are gradations in this feeling, it seems to me.

Q. When you were saying that you could talk in a general sense about the motivations and values of the 1837 treaty negotiators, am I clear that what you meant is, you couldn't give us the specifics of what were in those individuals' heads, but that –

A. I could not speak to that at all. But I think it's extremely unlikely that these persons would have come out here to treat with the Indians bearing ideas and views

that were contrary to the views of the administration in Washington.

Q. And were those views related to the views of the average frontiersperson?

A. Yes.

MR. FROEHLE: No further questions, Your Honor.

THE COURT: Mr. Szotkowski, anything?

MR. SZOTKOWSKI: No further questions, Your Honor.

THE COURT: Mr. White?

MR. WHITE: Nothing further, Your Honor.

THE COURT: Mr. Arum?

MR. ARUM: Nothing further.

THE COURT: You're excused, Dr. Hofsommer.

(Witness excused)

MR. THOMPSON: Your Honor, the Landowners rest,

* * *

Doty To Cass, "Northern Wisconsin In 1820," VII Wisconsin Historical Collections, pp. 195-206

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Pl. Ex. 31

In Supp. of Pl. Mot. Summ. Judgment
1837 Treaty
Civ. No. 5-92-159

Northern Wisconsin in 1820

By James Duane Doty

DETROIT, September 27, 1820.

To His Excellency, LEWIS CASS:

SIR: – The following information received at Sandy Lake, during your absence to Red Cedar Lake, in answer to your interrogratories, I have the honor of communicating to your excellency. It was obtained from persons who have traveled over and resided in the country, almost from their infancy. No opportunity was afforded of obtaining it from better or more enlightened sources than those improved, and I think in general it may be relied upon as correct.

There are three chief places of residence of the Indians in this country. The first, and principal, is Leech Lake; the next, Sandy Lake; and the third, Fond du Lac, of Lake Superior.

At Leech Lake there are more than two hundred men, at least three hundred and fifty women married to them, and about eleven hundred boys and girls. Their hunting ground is around the Lake, and extends north to Round Lake, west to the Red River, south to the Sioux, and east

until they meet the Indians of Sandy Lake. Their game is deer, bear, beaver, otter, muskrats, marten, fisher, raccoon, and a few red and gray foxes. The only buffalo they kill is on the border of the Sioux country. The beaver is hunted particularly on the river St. Peters and its tributaries. A few are found in other parts. Most of the small rivers abound in otter. The other game is found throughout their country.

None of the Western waters are as abundant in white fish as Leech Lake. There are great numbers also in Lake Winnepec, Red Cedar, and Cross Lakes, but the rivers are destitute of them. They are fine flavored and more delicious than those of the Sault of St. Mary.*

There are various other fish in these and other lakes, and rivers, as pike, carp, black bass, cat-fish, etc. A fish called by the savages too-nee-bee, and by the French "Telibees" not equal to, but greatly resembling the white fish, is found in the large lakes above mentioned, and particularly in abundance in Leech Lake. The fish and the wild rice are the chief sustenance of the traders, and without them the trade could scarcely be carried on. The telibees are taken in nets of from 60 to 100 fathoms long, late in autumn, and to preserve them, are hung up by the tail in the air until frozen. From July until November the white fish are taken, and the telibees from the 1st of September to the latter part of November, at the setting in of the ice, and both on the same ground. Neither are taken in the winter; but from the 20th of May to the 20th

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*Our Wisconsin Fish Commissions should test this statement, and, if correct, profit by it.

of June, immense numbers of telibees are caught. During the winter, pike and pickerel may be obtained.

The water fowls throughout this Northwestern country are nearly all the same. They are the bustard, wild goose, several kinds of ducks, as the black, French (nearly resembling the tame) wood duck, etc., swan, pelican, loon, and the gull. A fowl called the cormorant is found here. It lives on fish, is nearly the size of the raven, and of the same color; has a leg like a loon, a bill about four inches long shaped like a snipe's, except at the peak, which is rather crooked and sharp like an eagle's; it alights in the water and on trees, and, it is said, *roosts* by suspending itself by the bill from a limb of a tree. The birds are nearly the same as those commonly found in the Eastern States.

The moose, elk, rein and common deer, wolf (not north of Sandy Lake), red and white ermine, wolverine, lynx, skunk, porcupine, wood-chuck, and red striped squirrels are found in different parts of the country.

There are many turtles of various sizes; some very large and delicious are found in the lakes.

No rattle, or other snakes, except the small striped or garter snake.

The Indians of Leech Lake are in bands; and each band has its own chief. No general leader of the whole is acknowledged; but the Brachu who resides at Sandy Lake has, when he is present, some considerable influence over them. The chieftainship descends from father to son, and the line becomes extinct by the death of the last male, the females being entirely excluded. In filling vacancies they

generally elect from the tribe the most valiant, brave and powerful, or the man they deem the wisest, or the most eloquent speaker; and this last qualification is considered highly essential and is generally preferred; and the person elected becomes the heir to all the honors of the old line. In fact, they always claim this right of election, but it is occasionally dispensed with when some daring, bloody fellow, usurping the throne, holds, either by his ferocity, or his many and influential relations, his tribe in awe. Such an one, however, is soon – *casually* – disposed of, if he does not in a short time ingratiate himself by some extraordinary act with the band. Even then he can scarcely be considered secure, for he is only respected, not loved; and is liable to be desposed at any time. Aware of this, he generally moves cautiously, and deals severely.

The chief of the Leech Lake Indians is Eskeebucecose, or Flat Mouth; the regular chief of those at Sandy Lake, the Bras Casse, or Broken Arm – in Indian, Bookoosaingegun; and the chief of Fond du Lac, Chingwauby, or as called by the French, "the Deaf Man." These are severally influenced by the Brachu, who, it seems, raised himself to this superior station merely by his eloquence. His ancestors have always been of good standing, and for a time furnished chiefs for the tribe at Sandy Lake. It appears he is the first Emperor of these tribes, they having been entirely distinct and independent previous to his time.

The Sandy Lake tribe of Indians is the second in size. It has eighty-five men, two hundred and forty-three women and children, besides thirty-five half-breeds. They are divided into three parties, one resides about half way from Sandy Lake to Leech Lake, at a place called

Pacaugumaw, on a small lake through which the Mississippi runs, and near the boundary between these and the Leech Lake Indians. These Indians hunt north to Vermillion Lake, the headwaters of the Fond du Lac River, and on which the North West Company has an establishment; west to Paucquagunaw, above mentioned; east to the Fond du Lac River and down it to the Portage de la Prairie: and south to the borders of the Sioux country, or near Elk River which falls into the Mississippi. It is about one hundred miles to Pacaugumaw, the same as Vermillion Lake, fifty miles to Portage de la Prairie, and one hundred and twenty miles to Elk River. These are considered direct courses.

Their furs and game are the same as those of the Leech Lake Indians. The birds do not vary from those in the country around Leech Lake. White-fish and telibees are found in Sandy Lake, but inferior in quality to those of Leech Lake. The latter part of September the white-fish begin to run, and continue until winter sets in. The telibees are taken at the same time as those in Leech Lake.

Winter commences about the first of December, and breaks up by the first of April. It is nearly the same as at Montreal. This applies also to Leech Lake, but it is much colder at Fond du Lac, where the season is generally fifteen days later. The depth of snow is not as great at Leech Lake as at Sandy Lake. Around Lake Superior it falls two and a half or three feet deep, but decreases to the west, so that when the snow is three feet in depth at Fond du Lac, the ground is scarcely covered at Sandy Lake. A south wind may prevail at Fond du Lac three days without decreasing the snow; while at Sandy Lake, one of twelve hours invariably produces a thaw.

The summer is generally warm and pleasant. Vegetation springs up and advances rapidly as soon as the snow has disappeared. Potatoes grow finely at Sandy Lake, and most of the garden vegetables may be raised.

The food of the Indians in this country varies according to the different seasons. They occasionally subsist on the waub-es-see-pin. It resembles a potato, is mealy when boiled, and grows only in wet, clay ground, and about one and a half feet deep. The crane potato is another article of food, called by them the stich-anc-waub-es-see-pin. It is of the same kind, but inferior in quality to the waub-es-see-pin, and is found throughout this country. The wau-tap-pin-ee is a small root frequently pulled three feet long, which is dried in order to preserve it. This root is found on the southern shore of Lake Superior, but is seldom brought as far as Sandy Lake. These three are boiled when prepared for food. They also use the *bois retors*, or twisted wood, in cases of extreme necessity. It resembles the bitter-sweet, runs into the tops of the highest trees, and from one tree to another, has thick bark, and is sweet and palatable when boiled. To these may be added the wild rice – *fols avoine* – and such game as they occasionally kill, eating every kind and every part. I saw them yesterday cooking a skunk, but when it was prepared for the table, it was impossible to approach the lodge except to the windward. They boil the excrements of the rabbit with their rice "to season it," and esteem it a luxury. To make that dish still more palatable, and one of their highest epicurean dishes, they occasionally take a partridge, pick off the feathers, and without any farther dressing except pounding it to the consistency of jelly, throw it into the rice, and boil it in that condition. In this

they seem not far above the brute creation. It is scarcely possible to account for such an appetite or relish, except it be that necessity having compelled them frequently to resort to this loathsome food for sustenance, they have at length acquired a preference for it.

A band of the Sandy Lake tribe of Indians resides at Paucquaumenomiccon, or Rice Lake, between twenty and twenty-five miles south of Sandy Lake. There are only thirteen grown men in the village; their number of young men, squaws and children is forty-seven. They hunt in the woods adjoining the Lake. To the east of their village and near Fond du Lac they occasionally kill a few moose. This band has never been much noticed by the English Government, and has been generally well disposed towards ours.

All of the men at Sandy Lake and south of it, annually, in the month of March, go to the borders of the Sioux Country, and as far beyond as their fears will permit them, to hunt the beaver, which hunt is called by them no-tah-mic-qua, and signifies "searching for beaver" – "mic" meaning beaver. Their families being left at home in this hunt, repair to the sugar camps, and are engaged in manufacturing sugar during the absence of the men, of which they make very large quantities.

The Indians around Sandy Lake, in the month of September, repair to Rice Lake to gather their rice. In no other place does it grow in as large quantities as there. This lake is about five miles long and three broad. It might perhaps be called a *marais*, for the water is not over five feet deep, and its surface is almost entirely covered

with rice. It is only in morasses or muddy bottoms that this grain is found.

It was formerly the practice of the Indians, when the grain was in the milk, to pass around in canoes and gather up the tops in large shocks or branches and fasten them, to render the collecting of the grain much easier after it had ripened. By this means they obtained it also in much larger quantities than at present. This work of harvesting is performed by the females. It is now gathered by two of them passing around in a canoe, one sitting in the stern and pushing it along, while the other with her back to the bow and with two small pointed sticks about three feet long, one in each hand, collects it in by running one of the sticks into the rice and bending it over on to the edge of the canoe while with the other she strikes the heads suddenly and rattles the grain into it. This she does on both sides of the canoe alternatively, and while the canoe is moving. About a gill is generally struck off at blow. It is not ripe when harvested. It falls covered with a husk, and has a beard about two inches long. One method of curing the rice, and that which makes it the most palatable, is by putting it in a kettle in small quantities, and hanging it over the fire until it becomes parched. A round hole is dug in the ground about one and a half feet deep, and three in circumference, into which a moose skin is usually put. Into this hole the grain is then poured, where it is trod by an Indian until completely hulled. This is a very laborious work, and always devolves upon the men. After being sufficiently trod, it is taken out and cleaned, in a fan made or birch bark, shaped something like those used by farmers. This is the most expeditious method of curing it.

The other method differs from this only in drying. It is as follows: a scaffold is made of small poles about three feet from the ground and covered with cedar slabs. On this the rice is spread, and under the scaffold a small slow fire kindled, which is kept up until the grain becomes entirely dry. It takes nearly a day to dry one of the scaffolds full. The grain cured in this way is more nutritious, and keeps much longer than the other. By that parched in a kettle, the substance appears to be destroyed. The rice, when cured, is put into sacks of about a bushel. A sack is valued at two skins. At fathom of stroud or a blanket will buy two sacks. A skin is valued at two dollars.

One family ordinarily makes about five sacks; though those who are industrious sometimes make twenty-five. The last, however, is very rare. A few provident Indians save a little for the spring of the year to eat with their sugar, though generally by the time they have done curing it, the whole is disposed of for trinkets and ornaments. Thus by gratifying their vanity, they are left nearly destitute of provisions for the winter – choosing to endure hunger and the greatest misery than mortify their pride!

The Fond du Lac Indians are divided into bands, and have no fixed places of residence, wandering around on the rivers and lakes; their time is occupied alternately in hunting and fishing; their country being poorer than that of either of the before mentioned tribes. They hunt west to the Sandy Lake Indians, north to the sources of Snake River, which empties into the Fond du Lac River, eighteen miles above the mouth of the Savannah, northwest to Encampment Island in Lake Superior; thirty-six miles

above Fond du Lac, and on the southern shore of the Lake to the River Brule, and south to Pine Lake, the northern boundary of the Fols Avoine Indians, and about one hundred miles from the establishment on Fond du Lac.

Their principal game is moose, bear, marten, mink, muskrat, case cat (lynx), hedgehog, of which they have great numbers, otter, and a few beaver. They have neither the buffalo, deer, wolf, raccoon, fox, or wolverine.

The tribe consists of forty-five men, sixty women, and two hundred and forty children. There are about thirty half-breeds, and three freemen, who have families. The freemen are Canadians married to squaws, living entirely with the Indians, and are not engaged to the Southwestern Company, by whom as well as the Indians, they are considered a great nuisance, being forever exciting broils and disturbances. There is an old Negro in the employ of the company who has a squaw for a wife, and a family of four children residing in Fond du Lac.

These Indians have in no degree the spirit and genius of those in the Upper Country, by whom they are considered very stupid and dull, being but little given to war. They consider the Sioux their enemies, but make few war excursions. They sometimes join those of the other tribes, but have never taken that deep interest in the struggle that the others have. In their manner and customs they resemble the Indians of Sandy Lake, but are in no respect their equal, particularly in those things which may be supposed to ameliorate their condition in life.

There are two grand water communications with this country; one by Lake Superior and the Fond du Lac River,

and the other by the Mississippi. The first is considered the most eligible route. It is about thirteen hundred miles from St. Louis to Sandy Lake, and ten hundred and fifty from Detroit, by water, to the same place. There are many rapids in the Mississippi, particularly above the Falls of St. Anthony, which it is almost impossible to ascend with boats or canoes. The waters of this river are also considered unhealthy. On the other course, the greatest difficulties are found in the rapids of the Fond du Lac River; but as this River is ascended only one hundred and fifty miles, and the rapidity of the Mississippi continues for six hundred, and a strong current the residue, the difference in the exertion and fatigue between the two routes is very great. Lake Superior is computed by the voyagers to be four hundred and eighty-four miles long. It is three hundred miles from Detroit to Mackinac, and forty from there to mouth of the River St. Marys. That river is forty miles long.

Communication may be had with the Mississippi from Lake Superior by the Tenaugon, Iron, Carp, Presque Isle, Black, Montreal, Mauvais, Brule and Fond du Lac Rivers.

The Tenaugon is ascended thirty-six miles, where a portage commences of two hundred *pauses*, to the "old plantation" as commonly called, but by the French "vieux desert," "old deserted place," which is on a small lake of the same name about four miles long, and three broad. Two Rivers rise in this lake, one the Abenomins, which empties into Green Bay; the other discharges into the Sauteur River. They are both navigable for canoes.

Iron River is so rapid that a portage is commenced at its mouth. The canoe is scarcely put into its water in the whole length of the river. It leads near some navigable waters of the Ouisconsin.

Three miles above the mouth of Carp River is a perpendicular fall of about forty-five feet, when it passes Porcupine Mountain; above, the stream is small, and with difficulty ascended.

Presque Isle River has many rapids, and is seldom used. Black River is the same.

The Montreal River is not navigable; but at its mouth, on the east side, a portage is made of one hundred and twenty *pauses* to a small lake; in which distance the Montreal River is crossed twice, the first time at eleven *pauses*, and the second at eighty. The lake is three miles long, and is the head of another branch of the Sauteur. This fork runs fifteen miles into Turtle Lake, which is about two miles over, thence it runs a few leagues into a small lake, passing through which it continues on until it joins the fork from Old Plantation Lake, thirty-three miles from Turtle Lake. A lake of considerable size is connected with Turtle Lake on the northeast by a river. In Lake Du Flambeau the Southwest Company have an establishment of five traders and twenty hands, the return from which last season was about fifty packs. It lies from Turtle Lake near southeast. The route is from the mouth of the Montreal to Turtle Lake, from which there is a portage one-fourth of a mile to a small pond, thence up the outlet of a small lake one-fourth of a mile, from which a portage of three miles is made to the Old Plantation River. This is descended eighteen miles to the entrance of the Riviére

du Flambeau, which rises in the lake of the same name, and is twenty-four miles long. The Company's fort stands on the north side of the lake. The lake is crooked, is four miles long and one broad. From this there is a chain of lakes which extend down to the head waters of the Ouisconsin. Portages are made from one to another so as to connect the communication in that direction. The small river formed by the junction of the Turtle and the old Plantation Rivers, is almost entirely a rapid; and running over a bed of rocks, is very dangerous. It takes seven days to descend it, and is one hundred and seventy-five miles long. The River Sauteur (Chippewa) which is also rapid, is very wide, and about one hundred and eighty miles long, emptying into Lake Pepin. It is sixty-three miles from the Tenaugon to the Montreal River.

Mauvais River is ascended about one hundred miles. A portage is then made of twenty-two *pauses* to a small lake which is connected with another by a stream one-quarter of a mile long. From this is a portage of one *pause* to a lake; and another *pause* to another lake, which last is connected to a third by a small strait, perhaps thirty rods long. A portage of one *puase* is made to Clam Lake, in which a branch of the Sauteur rises. This Lake is one mile long and three-fourths of a mile broad, which is the general extent of all the lakes on this route. It is from this, six miles to Spear Lake, fifteen miles to Summer Lake, and twelve miles to a lake called by the Indians, Poequayahwan. The branch continues through this Lake, and passes out on the southeast side. On the west a small river enters, which is ascended fifteen miles, whence a portage is made of ten *pauses* into Lake Coutere, on which the Southwest Company have an establishment. It is nine

miles long and three broad, and is connected with the Sauteur by a stream thirty miles long, which issues from it. The Mauvais is twelve miles from the Montreal River.

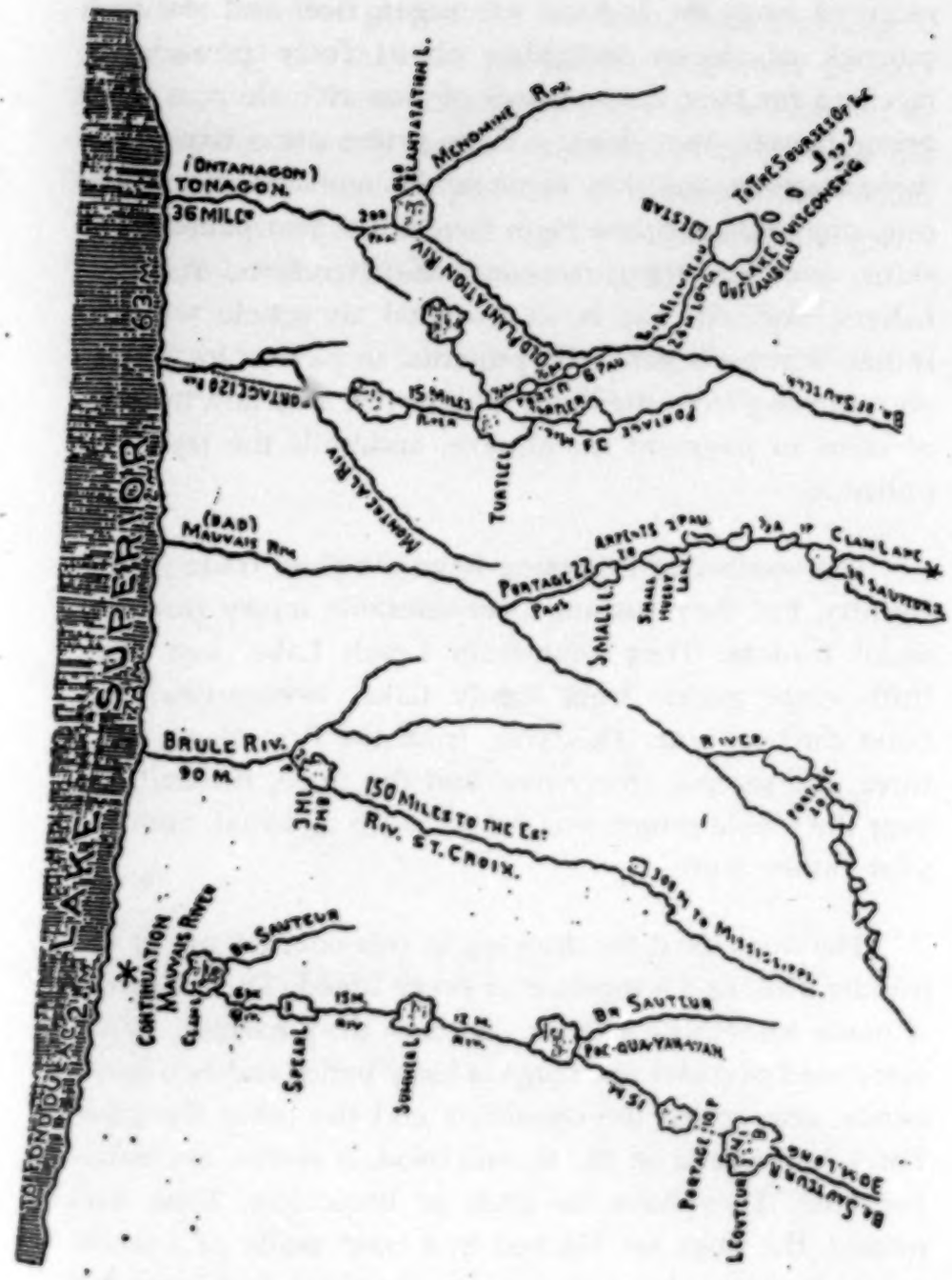
The River Brule, seventy-eight miles from the Mauvais, is ascended ninety miles to a bend, from which a portage of two *pauses* is made to Lake St. Croix, the head water of the river of the same name. It is three miles long and two broad. On the River St. Croix, one hundred miles from the lake, the Southwest Company have an establishment. It discharges into the Mississippi three hundred miles from that trading post. Between the Mauvais and Brule Rivers, several small streams empty into Lake Superior; as the Raspberry, Sandy, Sescawnawbekaw, Cranberry, Bullrush and the Little Iron Rivers. Goddard's River is between the Brule and Fond du Lac.

As the Fond du Lac River was ascended by you, it will be unnecessary to describe it. I will merely state, that it rises in Vermillion Lake, is near three hundred miles long, and that its general course is east. It may scarcely be called navigable above the Savannah, which enters one hundred and thirty-six miles from its mouth. The Savannah is twenty-four miles long, and is ascended to its source. The portage to the small river, which empties into Sandy Lake, is six miles – the river is descended twelve. Sandy Lake is four miles long and two wide. By the outlet of the lake to the Mississippi is two miles, but by land it is hardly the half of a mile. It is two hundred and fifty miles from Sandy Lake to Vermillion by way of the Mississippi and Trout Lake.

The accompanying map was drawn by the person who communicated the preceding facts, and may, in some degree, convey an idea of the principal water-courses of the country.

About half way from Sandy Lake to Red Cedar Lake below, a river empties into the Mississippi which rises in Duck Lake. A portage of six miles is made from the Mississippi, opposite Sandy Lake, to this river, which is ascended sixty miles. From Duck Lake the communication with Leech Lake is over a country, one-half of which is covered with lakes. The land is generally heavily timbered.

Trade. – A skin is estimated at $2. A two and a half point blanket is sold for four skins; one fathom of stroud, the same; half a pint of powder, one skin; thirty balls, the same; five branches of wampum, or two hundred and fifty *grans*, one skin; a Northwest cased gun, ten skins; one beaver trap, four skins; a large scalping knife, half a skin; twist tobacco, two skins per fathom, three plugs for a skin, and four skins per carot; a mesh, or forty branches of white beads, one skin; a pair of leggins with ribbons and beads to garnish, two skins; one-half axe, one skin; one hatchet, one skin. These are the principal articles of trade. Divers other things are given as presents. If an Indian obtains a credit for his supplies for the season, he must be furnished with a flint, a needle, an awl, a gun worm, a little vermillion rings, beads, and three or four inches of tobacco, besides various other articles, for which the trader charges nothing. In a credit of six hundred skins, if the trader gets three hundred in return for his goods, he considers himself recompensed. He frequently does not obtain even this proportion. The articles



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received from the Indians are sugar, rice, and skins. A mocock of sugar, weighing about forty pounds, is received for four skins: a sack of rice, two skins; a large prime beaver, two skins; a large prime otter, two skins; three martens, one skin; three minks, one skin; ten musk-rats, one skin; a prime bear, two skins; two prime buck skins, one skin; three raccoons, one; two lynx, one; two fishers, one. An axe is so essential an article with an Indian that he is generally punctual in paying for it; and on returning from his hunt, he lays out a certain number of skins in payment for his axe, and calls the trader to notice it.

The Southwest Company have the chief trade of this country, but they sustain a considerable injury from the small traders. They sent from Leech Lake, last year, thirty-eight packs; from Sandy Lake, twenty-five; and Fond du Lac, nine. This year, from the first place, fifty-three; the second, thirty-five; and the third, fifteen. Last year the whole return was not as much as usual, and this year rather more.

The dogs used for drawing in this country are of the middle size, and a mixture of every breed. Their harness is made something like the common dray harness; being composed of collar with tugs, a belly-band, and two back-bands, one across the shoulders and the other the hips. Three horse bells on the second band, it seems, are indispensable. They have no lines or breeching. Thus harnessed, the dogs are hitched to a train made of a white oak slab, dressed down smooth, about six feet long and fourteen inches wide, and turned up before in the shape of a sleigh runner. On the crust or ice a dog will travel,

with two hundred pounds on his train, from morning to night, as fast as a man can walk. They frequently go sixty miles in a day. These dogs are starved in the summer so that they can scarcely stagger around, but by the time the winter sets in, they are put into the finest order. When worked, they are fed only at night – not a morsel is given in the day. Fish is their common food.

Cleland, Report On The Hunting, Fishing And Gathering Rights Of The Fond Du Lac Band Of Chippewa Indians (November 1, 1994), Cover Page And pp. 1-20, 92 and 112

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

REPORT ON THE ETHNOHISTORICAL BASIS OF THE HUNTING, FISHING, AND GATHERING RIGHTS OF THE FOND DU LAC BAND OF CHIPPEWA INDIANS UNDER THE TREATIES OF 1837 AND 1854

November 1, 1994

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PREFACE

Seeking an accurate understanding of historical events which took place a century and a half ago can be very difficult. As a product of human observation and design, historical documents reflect the inherent biases which result from the observer's gender, age, occupation, religion, political views and other interests. Letters, journals, reports, maps, and even photographs can also be

written in such a way as to promote a particular perspective on the events of the past. To some degree the diversity of contemporary opinion balances these biases. Thus, for example, a government Indian agent may be writing to point out that his charges are being exploited by merchants because they do not understand arithmetic, while a teacher in a mission school may praise the growing abilities of the same Indians to handle mathematical calculations. The modern historian is well aware of the biases, both implicit and explicit, in the documentary record and seeks to overcome these by understanding the documents within their context, that is by knowing the producers of the documents and their interest. This information is then incorporated into the historical critique.

Working with documents which relate to the actions of people of another culture adds immense complexities beyond those already cited. A contemporary American of the nineteenth century, observing the behavior of Japanese, African or Chippewa people would likely have little, if any, understanding of the economic, social-political or ideological precepts which motivated their actions. For example, an English speaking American in the eighteenth century might, in observing a Chippewa tying the legs of a dog and throwing it into the lake, report that this was a cruel means of thinning the dog population. In fact such an action would much more likely be a dog sacrifice to the underwater panther to assure safe passage for an anticipated canoe voyage. If the Chippewa had wanted to thin the dog population, the surplus dog would most certainly have been consigned to the cooking pot since dog flesh was a considered a great delicacy among Great Lakes Indians during that period.

As this example quite starkly illustrates, a cross-cultural understanding cannot be satisfactorily derived from historical documents alone. No matter how hard one may strive to understand nineteenth century Chippewa events, such understanding cannot rest on the writing of government officials and missionaries alone. Determining Chippewa motivation and understanding of past events, therefore, cannot depend entirely on documents, nor be solely the domain of the historian.

For the specific purpose of understanding the nineteenth century Chippewa of the Great Lakes region, it is necessary to analyze the historical documents within the context of what is known of nineteenth century Chippewa culture. There is no doubt, given the ethnographic work among these people, that Chippewa culture was based upon entirely different principles, which were often completely opposite of those which organized nineteenth century American culture. For example, a highly respected Chippewa chief of the early nineteenth century held his position by virtue of his wisdom, generosity and lack of political ambition. Although there were several routes to leadership, renown was based on charisma not authority. In fact Chippewa chiefs were consensus makers not power brokers. Another example is in the economic realm, for the Chippewa economic exchange was in the form of gift giving. The size of the gift, its form, and the timing of giving was shaped by the social relation between giver and receiver. For the Chippewa, the exchange had to be social and political as well as economic. The scarcer commodities became, that is the more valuable they were, the more readily a Chippewa would give them to another. Such action not only increased

feelings of goodwill, but also obligated the receiver to mutual support in the future. Thus, in a real sense Chippewa economics worked on a principle exactly opposite to supply and demand.

The point of these illustrations is that without an understanding of the workings of Chippewa leadership or economics, the records of nineteenth century observers pertaining to these subjects will not yield any more information to the modern historian than they did to the person who originally made the record. On the other hand, such records are a tremendously important resource to the scholar who, knowing these cultural principles, can better interpret the document and use it to understand the actions of the Chippewa in their own cultural context.

From this realization a new field of historic inquiry known as ethnohistory developed in the United States three decades ago. Ethnohistorical practitioners are drawn from the traditional fields of both history and anthropology, but by virtue of the theory and the methods borrowed from both disciplines, have developed unique approaches to understanding the documents which relate to cross-cultural contacts. These techniques, and the conclusions that they produce, are shared in the scholarly journal *Ethnohistory* and the professional meetings of the American Society for Ethnology.

Beyond the theory relating to historical and cultural bias, is the documentary record. We also need to consider the specific circumstances related to the way in which particular individual Chippewa might have understood historical events. Beyond cultural background, the life

experiences of Chippewa chiefs included their own goals for themselves and their people. Such factors as experience in negotiation and treaty making must be taken into consideration. A chief who had been involved in multiple treaties, would, we assume, have a better understanding of the process of treaty making, the negotiation process, and the terminology used in treaty making, than one who was new to the process. What a chief learned or understood at one treaty, would help him understand the next. Likewise, the actions of the parties subsequent to the treaty form an important ingredient of personal experience. A chief who understood a provision of a treaty in a certain way might have his views changed by subsequent action.

Beyond both the histographic and experiential aspects of nineteenth century understanding of historical events is the problem that the Chippewa recorded their history in oral form. As a consequence, the things told to them during the course of treaty negotiations frequently were more important to them than what was actually written in the treaty. In the few instances where Chippewa understanding was recorded in written form, it bears little resemblance to the treaty document. This does not mean that these understandings are incorrect or less accurate, only that they are different, the product perhaps of a vastly different cultural perspective.

Given these differences one might wonder if it is possible to understand how nineteenth century Chippewa would have perceived their relations with Americans. There is room for some optimism; while difficult and never complete, it is possible through the use of ethnohistorical analysis to gain such an understanding.

Scholars may of course disagree as to the particulars. Different or contrasting views may be judged in a comparative sense, not simply by the rules of logic, but also by the scholarly method. Here the thoroughness of documentary research, the attention given to sorting through the various biases of the cultural record, the understanding of historical and cultural context, and the attention to the views and theories of respected professional colleagues form the basis for judgment of the credibility of conclusions drawn from research.

In the preparation of this report I was asked to conduct a full and open study of the treaty history of the Fond du Lac Chippewa including their understanding of the treaties and their relationship with the United States until 1854. To a substantial degree, this report follows and is supplementary to a report entitled "Preliminary Report of the Ethnohistorical Basis of the Hunting, Fishing, and Gathering Rights of the Mille Lacs Chippewa" which was Plaintiffs Exhibit P-0297 in the case Mille Lacs Band v. State of Minnesota No. 4-90-605. In order to prepare these reports, I visited various archives including the United States National Archives in Washington D.C., the Wisconsin Historical Society in Madison, and the Minnesota Historical Society in St. Paul. In the task of identifying pertinent documents and making file copies, I was assisted by Dr. James McClurken of Ethnohistorical Research of East Lansing, Michigan and by staff members of Aurora Associates, Williamston, Michigan who worked under my direct supervision.

CHAPTER 1

THE CHIPPEWA OF FOND DU LAC

The Chippewa People.

The Native people who are referred to as Chippewa are part of a far flung cultural group occupying the territory between Quebec in the east and the Great Plains of the United States and Canada in the west, and from Hudson Bay in the north to central Michigan, Wisconsin and Minnesota in the south. The word Chippewa is actually a corruption of *chipwa,* which in turn was corrupted to Ojibwa which seems to mean "pucker up by roasting."[1] Apparently, this was in reference to the way the toes of moccasins were sewn. The terms Chippewa and Ojibwa are thus synonymous. In fact, the Chippewa people refer to themselves in their own language as *Anishnabe* or, in the plural, *Anishnabeg.* By this term they identify themselves as distinct from the *Chemokmon* (Americans), *Wemitigoji* (French) and other racial or ethnic groups. The term *Anishnabe* actually implies common mythological origins and in this sense a spiritual superiority over non *Anishnabe.*

According to Chippewa mythology, the *Anishnabeg* were created by the Great Spirit, and over time migrated from the east to eventually occupy the region which we now know as Minnesota, Wisconsin, and Michigan. The stories of the migration tell of the many generations which founded the villages throughout the huge domain

[1] Warren, William *1984 History of the Ojibwa People.* St. Paul: Minnesota Historical Society Press. p. 36.

they occupy as well as the relationship between Chippewa clans. The clans are really super-families, that is, large groups of people who believe themselves related through an original ancestor. Clans form the basis for some cooperative activities, the regulation of marriage, and political succession. The mythological origins of the clans or totems, the animals and birds for which the clans are named, help to account for both the relationship between groups and the character of the people identified as members. Thus, for example, it is said among the Chippewa, that the members of the northern clans, such as people of the pike totem, are timid because they migrated north and did not participate in war with the Dakota. The *maheengun* or wolf clan people, on the other hand, were fierce and pushed boldly into the country of their enemies.

Membership in a particular clan was a matter of birth, since all Chippewa belonged to the clan of their father. The rules of marriage prescribed that women marry a member of another clan, and that the couple reside with the family of the husband. In this way both families and clans were linked together by marriage. Sisters of one's own clan, through marriage became the wives and mothers of members of other clans, and thus became the conduits of intergroup cooperation.

In the nineteenth century, the local band was the largest political division of Chippewa society. Normally the band consisted of twenty-five patrilineal families, or a

total population of from fifty to two hundred fifty people.[2] These families would be intermarried and together form a group of interacting kin and in-laws who jointly used the resources of a defined territory in the course of a season. Since any given food resource could be precarious due to such factors as fluctuation in weather, population size, or mobility of the prey, the hunter's and gatherer's strategy for survival is to move from resource to resource by season. In this way the band territory is defined in terms of the resources it contained and structured in such a way to maximize abundant resources and minimize the effects of shortages. The patterned travels of a group of cooperating hunters and gatherers in the course of a year is known as a seasonal round.

Each family used a designated area within the territory of the band for winter hunting. In the course of the seasonal round, one or more of these bands would reside together and thus be identified with a particular locality, resulting in, for example, the Fond du Lac band, the La Pointe band and so on. It would be more correct to refer to these entities as the Fond du Lac bands or La Pointe bands because in fact each of the bands which habitually gathered at Fond du Lac or La Pointe were politically distinct. Each band was named for the leader; thus at Fond du Lac in the early nineteenth century the two resident bands were *Mongozid's* band and *Shingoop's* band. Decisions concerning band action were made in

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[2] Cleland, Charles E. 1991 "From Ethnohistory to Archaeology: Ottawa and Ojibwa Band Territories of the Northern Great Lakes" in *Text Aided Archaeology* ed. by B. Little, Caldwell, N.J.: Telford Press.

consensus by the heads of the various patrilineal lineages or families that composed the band. Bands increased in number by the fission of old bands and were sometimes reduced in number as small bands died out. By and large, however, bands were very stable segments of Chippewa society.

Within any given Chippewa family's territory one would find a core group of related males; perhaps a father, his sons, and grandsons. Daughters would also belong to this family but would eventually join other groups as wives. Thus, groups of males form the basis of the residential stability within the band territories while women who marry into families and bands form the in-law links between them. It has long been part of anthropological theory that this form of family, that is, the patrilineal descent group, is best suited to subsistence activities based on the cooperation of males. Thus, among hunters and fishermen like the Chippewa, the patrilineal family provides a group of closely related and cooperating kinsmen who reside permanently in a territory. Over time they come to know the territory they hunt and fish exceedingly well which enhances their opportunity to provide for themselves and their families.

Although the members of any particular band could have accurately described the geographic boundaries of the band territory by reference to rivers, streams and other natural features of the landscape, the boundaries of band territories were, however, much different in concept than the way boundaries are conceived today. To put it simply, the boundaries between eighteenth and nineteenth century Chippewa bands were sociological rather than political. That is to say they were not formed to

exclude as much as to include. If the resources of band territories were needed by the families who belong to adjacent bands, they could be used by permission. Likewise, the boundaries between bands were as fluid as they were permeable. If the band grew by adding new families, its territory grew proportionately. In fact, when plotted on maps, the territories of bands seem in many instances to overlap significantly. This is because of the discrepancy between geographical description of the territory used by the families of a band and the often ambiguous affiliation of the families relative to named political groups. Thus, for example, some families identified as members of *Shingoop's* band at Fond du Lac might have thought of themselves as having a close affiliation with one of the St. Croix bands because of intermarriage. Perhaps the territory used of this family although described as part of the Fond du Lac band territory, might also be thought of as part of the territory of the St. Croix. Other families of the Fond du Lac band may have had similar in-law relationships with families at La Pointe. In either case, the family's territory was owned neither by the family, nor by the bands to which the family was related.[3]

Beyond the economic reality, the relationship between the Chippewa and the creatures of the natural world was very personal. Not only did they view totemic animals as mythological relatives, but their animistic belief system did not permit much physical, moral, or

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[3] Sahlins, Marshall 1972 *Stoneage Economics*. Chicago: Aldine Publishing. Cleland, Charles E. 1992 *The Rites of Conquest: The History and Culture of Michigan's Native Americans*. Ann Arbor: University of Michigan Press.

psychic separation between the human and non-human as categories of reality. As animists they believed that all things, both animate and inanimate, had the same quality of body and soul and that to some degree these entities were both separable and interchangeable. Thus, the taking of game or the gathering of herbs was a religious as well as an economic activity. Success in the hunt depended more on skill in manipulating the spirit of the animal than on skill in the use of the bow. As the Chippewa moved over the landscape, they faced unpredictable and potentially dangerous forces which could only be controlled by the application of the proper ritual and magic. In this sense, the Chippewa were profoundly devout people.

In the course of the nineteenth century, the United States, when it suited its purposes, sought to consolidate the interests of the Chippewa by lumping them in various ways. Thus, the United States created such entities as the "Chippewa Tribe", the "Lake Superior Chippewa" and the "Chippewa of the Mississippi". These had no reality for the Chippewa except insofar as they were given political meaning in treaties. The *Anishabeg* do not think of themselves as a political whole; there is little feeling of unity among the Chippewa except for that which flows from mutual kindred in common language and custom. The Chippewa continued to make political decisions on the basis of consensus within the band. This fact can be established by the way the treaties themselves were signed, that is, by the chiefs who represented each and every band.

Just as the band was the largest political unit of Chippewa society, the extended family which composed the band was the largest economic subdivision. The

nuclear family, consisting of a married couple and their children, was frequently extended by parents, grandchildren, brothers, unmarried relatives and sometimes friends. In any case, a division of labor within the family by gender and age provided a sufficient group of cooperating adults to ensure survival. Males hunted, trapped, fished, provided specific supplies, and protected the family. Women collected and prepared food, made clothing, provided heavy labor, planted gardens, fished and raised children. Each gender manufactured specific tools and implements and provided raw materials to form a complex interlocking net of responsibilities.

In Chippewa society, the goods and services necessary for mutual support and survival flowed typically between individuals as gifts. Reciprocal exchange obligations thereby followed kin relationships in such a way that the exchange itself created feelings of goodwill, helping to solidify the kin relations themselves.[4] Thus, in discharging their responsibility within the family, the father gave the family meat which the mother returned as meals, the father gave hides and the mother returned these as items of clothing. The mother gave the children toys and they in turn collected firewood and carried water. Each exchange strengthened the family and its ability to survive. It was thus impossible for a Chippewa to survive as an individual alone; each person, of necessity, had to be a member of a family and a band. It was on these groups that everyone's welfare depended.

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[4] Sahlins, Marshall 1972 *Stoneage Economics*. Chicago: Aldine Publishing. Service, Elman 1971 *Primitive Social Organization*. New York: Random House.

In almost every respect, Chippewa culture was as distinct from that of nineteenth century American culture as the belief system of a modern American's would be from Indians living in the midst of the Amazon forest. Perhaps the difference was even greater since nineteenth century Americans were not conditioned to cultural, racial or ethnic relativism. Unfortunately, their firmly held beliefs in civilization, Christianity, and the destiny of the American nation did not permit them to appreciate the beliefs and traditions of people of different cultures.

The Early Chippewa Settlement of Fond du Lac

The region at the west end of Lake Superior and at the mouth of the St. Louis River has undoubtedly been occupied since prehistoric times. The ethnic and cultural affiliation of the people who left archaeological remains in the region is not well understood. It is most likely that these prehistoric inhabitants spoke one of the Siouan dialects.

Initial Chippewa occupation seems to have taken place in the late seventeenth or early eighteenth century, although details are sketchy and are mainly recorded in the mythology of the Chippewa. William Warren, the nineteenth century historian of Chippewa culture, relates that the earliest Chippewa settlement in the western Lake Superior basin was at *Shaugahwaumikong* (Chequamenon Bay, Wisconsin). From this village the Chippewa established satellite villages to the south in interior Wisconsin and west along the Lake Superior shore. Late in the seventeenth century, a village called *Wiaquahkechegumeeng* was established on an island near the mouth of the St. Louis

River. According to Warren its founders were members of the Marten clan. Warren also reports that the Fond du Lac people belong to a general and informal division of the Chippewa people called *Kechegumwininewug* or Big Lake People in reference to Lake Superior.[5]

The foot of Lake Superior (Fond du Lac) is composed of a large bay called Superior Bay which is separated from Lake Superior by an extensive sand bar. This distinctive bar is identifiable on the birch bark maps used by shamen to illustrate the ancient migration of the Chippewa from the great salt sea in the east to Leech Lake in the west. The Chippewa thought about Lake Superior as a huge lodge with the St. Marys River forming the eastern entrance and the St. Louis river the western door.[6]

The St. Louis River enters Superior Bay from its own broad embayment which provides a complex series of inlets, marshes and islands along the lower river. Eighteen miles upstream, the St. Louis narrows and flows over a series of rapids. These rapids, as well as the embayment on the lower river, produce an excellent river fishery.[7]

Although a short stream, the St. Louis provided canoe access north and west through the Swan River system and, by way of its tributary, the Savanna, to Sandy

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[5] Warren, William W. 1984 *History of the Ojibwa People*. St. Paul: Minnesota Historical Society Press. p. 130.

[6] Dewdney, Selwyn 1975 *The Sacred Scrolls of the Southern Ojibwa*. Toronto: University of Toronto Press.

Kohl, Johann 1985 *Kitchi-Gami: Life Among the Lake Superior Chippewa*. St. Paul: Minnesota Historical Society Press. pp. 151.

[7] Kaups, Matti 1984 "Ojibwa Fisheries on the St. Louis River, Minnesota: 1800-1835." *Journal of Cultural Geography* (5)1.

Lake on the Mississippi as well. The Nemadji River which enters Superior Bay near the mouth of the St. Louis, provides access south to the upper drainages of the St. Croix valley and access to the Fond du Lac hunting territory. (Maps 1 and 2).

The Chippewa soon learned of the rich subsistence resources of Superior Bay and the lower St. Louis River as well as its strategic advantages at the beginning of canoe routes west and south. Likewise, access to Lake Superior made water travel east and north a relatively simple matter. Fond du Lac thus became the site of a major Chippewa settlement.

Turning again to Chippewa tradition, Warren reports that the great war chief *Biauswah* (the grandfather of the nineteenth century Chief *Mongozid*) made Fond du Lac his home.[8] From here he staged raids west and south against the Dakota residents of the Upper Mississippi and St. Croix valleys. During the first half of the eighteenth century, *Biauswah* and other Chippewa war leaders succeeded in pushing the Dakota from Sandy Lake, Mille Lac, and the St. Croix valley.[9] Following on these victories, the Chippewa gradually established their own villages in these and other locations within the territory abandoned by the Dakota. By the beginning of the nineteenth century they occupied all of the territory east of

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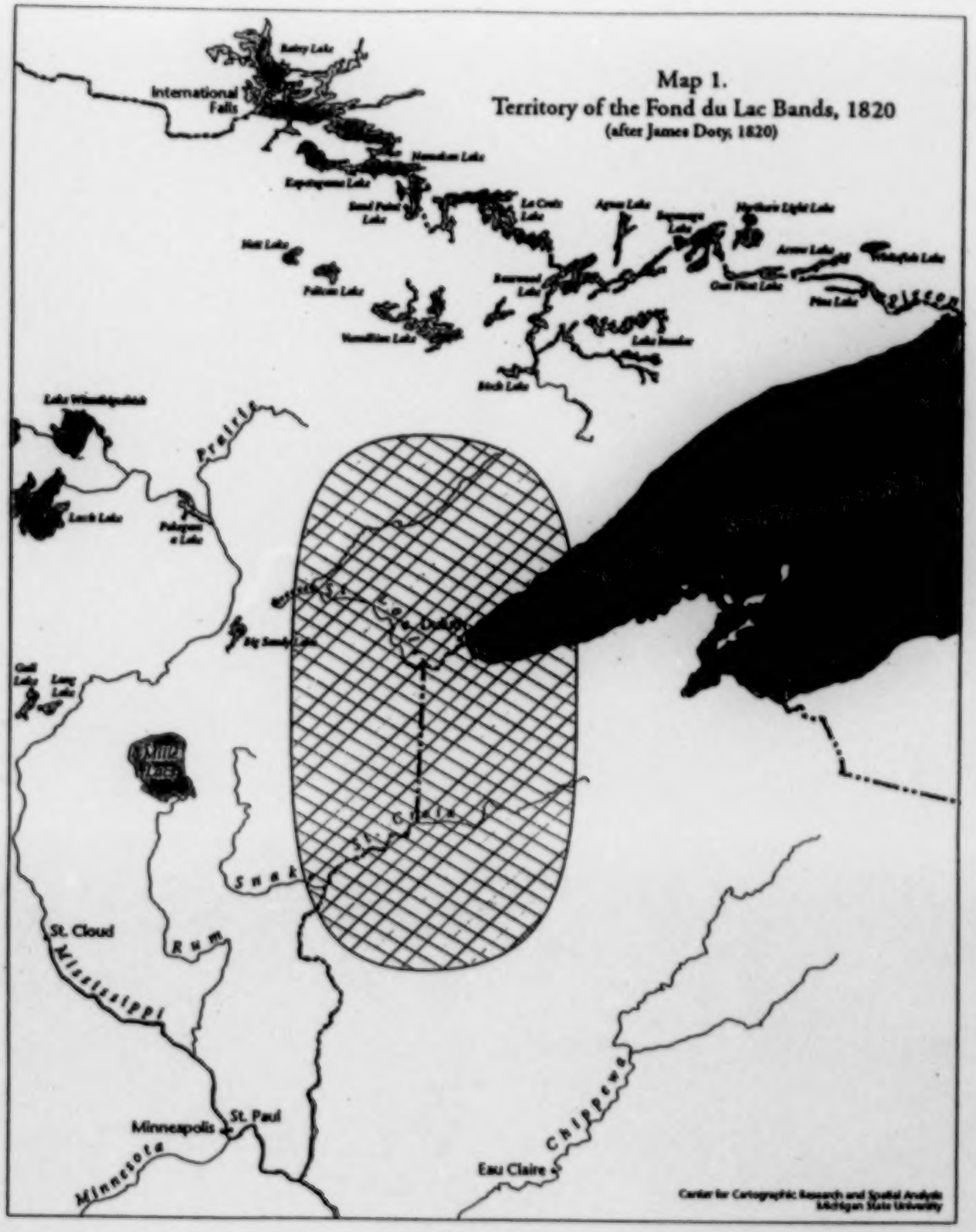
[8] Kohl, Johann 1985 *Kitchi-Gami: Life Among the Lake Superior Chippewa*. St. Paul: Minnesota Historical Society Press. pp. 147.

[9] Warren, William W. 1984 *History of the Ojibwa People*. St. Paul: Minnesota Historical Society Press. p. 176-177.



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Map 2.
Canoe Routes West and South of Fond du Lac

the Mississippi and continued to engage in intermittent raiding with the Dakota.

Harold Hickerson, who studied the historical documentation of Indian villages in the region west of Lake Superior, was able to demonstrate that Fond du Lac has been the site of a Chippewa village continuously since 1783.[10] As Hickerson notes, the village at Fond du Lac was "permanent" in the sense that it was a recognized nucleus of Chippewa residence. This also meant that the Fond du Lac village, though fluctuating in number of residents, and even location, was the home village of the bands of Chippewa which took their identity from the locale. The village at Fond du Lac, like other Chippewa villages, was heavily occupied in the summer by the people of several distinct and independent bands. The Fond du Lac people would spend the summer planting gardens, hunting in the surrounding countryside, and fishing in the river.

During the late summer families would move to shallow lakes, marshes, and sluggish rivers where wild rice could be harvested. The use of rice was regulated by specialists who controlled the beginning of the harvest period and who performed the blessing which would assure the perpetuation of the rice supply. Harvest season was a time of joyful visiting among the families who were engaged in collecting, parching, and winnowing the rice. As a productive and storable resource, rice production

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[10] Hickerson, Harold 1974 *Chippewa Indians III. Ethnohistory of Chippewa of Lake Superior.* New York: Garland Publishing Inc. p. 47-64.

was important to the Fond du Lac and other Chippewa bands.[11]

During the fall fishing season, fishermen would visit spawning grounds along the Lake Superior coast where they would take whitefish and lake trout in gill nets. With the onset of winter, each family of the Fond du Lac community would leave the summer village for their own hunting and trapping grounds in the interior. Dispersed, the families that composed the Fond du Lac bands would occupy the area north and east of the St. Louis River to Lake Superior, and south into the upper St. Croix valley at least as far as the Snake River.

We are fortunate to have a remarkably accurate description of the territory occupied by the Fond du Lac bands in 1820. James Doty, who became Governor of the Wisconsin Territory, in reporting of the groups that occupied the country west of Lake Superior of the Fond du Lac bands said to Lewis Cass:

> The Fond du Lac Indians are divided into bands, and have no fixed places of residence, wandering around on the rivers and lakes; their time is occupied alternately hunting and fishing; their country being poorer than either of the before mentioned tribes [Leech Lake and Sandy Lake bands]. They hunt west to the Sandy Lake Indians, north to the source of the Snake River, which empties into the Fond du Lac River eighteen miles about the mouth of the Savannah, northwest to Encampment Island in Lake Superior; thirty six miles above Fond du Lac, and on

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[11] Vernum, Thomas 1988 *Wild Rice and the Ojibwa People*. St. Paul: Minnesota Historical Society.

> the southern shore of the Lake to River Brule and south to Pine Lake, the northern boundary of the Fols Avoine Indians [St. Croix Chippewa], and about one hundred miles from the establishment on Fond du Lac.[12]

Map 1 shows the extent of the territory used by the bands identified with the Fond du Lac locality.

The writing of contemporary witnesses confirms the occupation and use of this region by members of the Fond du Lac band. For example, during the winter of 1804 the NorthWest Company trader Michel Curot resided on Yellow Lake in the St. Croix valley. His journal records that the Fond du Lac Indians he referred to as the sons of L'Hiver and Les Grand Oreilles arrived on their hunting ground in the vicinity on the 16 of October. Several weeks later he notes the arrival of La Petitte Mortre and another Fond du Lac hunter who were camped nearby.[13]

In the several years preceding the Treaty of St. Peters, the missionary Edmund Ely from Fond du Lac made several trips to the St. Croix valley to visit the mission station at Yellow Lake which was a long, three-day journey. In June of 1834, Ely headed south in company of an Indian family going to the St. Croix. Although the country was to Ely an impenetrable wilderness without paths

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[12] Doty, James September 27, 1820. J. Doty to L. Cass. 1876 Wisconsin Historical Collections Vol. VII, p. 201.

[13] Thwaites, Ruben G.(ed) 1911 "A Wisconsin Fur Traders Journal, 1803-04 by Michel Curot". *Collections of the State Historical Society of Wisconsin* 20:396-471. p. 414-418.

or trails, he remarked that the Fond du Lac people whom he accompanied "knew every lake and wood."[14]

In March of 1835 Ely again traveled back and forth from Fond du Lac to Yellow Lake. Near the latter place, Ely encountered the elder brother of *Ininni* one of the principle men at Fond du Lac. He also reports on a visit to the camp of the Fond du Lac Indian *Osana Amik*, Yellow Beaver, who was hunting with two or three other families between Fond du Lac and the St. Croix valley. Ely reports that between the 15 of November and the 15 of January, this group killed thirteen moose, nine bear and two deer, plus a variety of small game and fur bearing animals. Despite this quantity of food they were in want by March.[15]

While ranging their territory during all seasons of the year, the people of Fond du Lac, like other Chippewa, made extensive use of the resources of the land. In practice they knew and used hundreds of different species from their environment. As an example, Densmore lists two hundred plant species used by the Chippewa of Wisconsin and Minnesota.[16] In essence, the Chippewa used all of the plants and animals of their environment. From these they acquired the flesh, hide, fur, bone, horn,

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[14] Ely Journal Ms E-52. June 23, 1834. Minnesota Historical Society.

[15] Ely Journal Ms E-52. March 1835. Minnesota Historical Society.

[16] Densmore, Frances 1928 *Use of Plants by the Chippewa Indians*. Forty-fourth Annual Report of the Bureau of American Ethnology for 1926-27. Washington: U.S. Government Printing Office.

sinew, feathers, bark, fiber and sap to not only feed, clothe, and shelter themselves, but to provide cordage, glue, pigments and medicine and all other products necessary to sustain a comfortable life.

While the Fond du Lac bands certainly would have thought of this territory as their own, it is also true that the families of the bands who occupied these territories were related to the families who occupied the adjacent territories of other bands. Throughout most of the nineteenth century, every bit of land and water which now constitutes much of the States of Michigan, Minnesota and Wisconsin also belonged to specific Chippewa families. This was true whether or not ownership of the land had been ceded to the United States.

In 1820 Michigan Territorial Governor Lewis Cass organized an expedition to explore the south shore of Lake Superior. When it passed through Fond du Lac, Henry Schoolcraft, one of its members, reported that an Indian village with sixty people was located three miles above the mouth of the St. Louis.[17] As Hickerson correctly points out, the population figures given by both Schoolcraft and James Doty, who also accompanied the expedition, are most likely inaccurate. A better population estimate might be drawn from David Thompson who visited Fond du Lac in 1798, and George Monk who supplied figures for 1807. Both men reported that 30 families of Chippewa made Fond du Lac their home. This would indicate a population of between 150 and 200

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[17] Schoolcraft, Henry 1953 *Narrative Journal of Travels in the Year 1820*, ed. by Menton Williams. East Lansing: Michigan State College Press.

people. This estimate is also generally in line with one made by Jacob Brown in 1819 which reported 140 souls occupying the village.[18]

The next reliable source of information on the Fond du Lac population comes from a census compiled in the course of Schoolcraft's expedition to the source of the Mississippi River in 1832. The census lists a total resident population of 231 at Fond du Lac, 38 of whom were people of mixed descent. Thus the Chippewa population was about 193 people.[19] Given seasonal fluctuation of population in any given Chippewa village as well as the effects of epidemic diseases on early nineteenth century Indian population, this figure is consistent with the 150 to 200 people reported earlier as Fond du Lac residents.

The stability of population estimates until the early 1840s is also consistent with what is known of the political organization of the Chippewa population at Fond du Lac. Judging from the way the Fond du Lac Chiefs signed treaties in the 1820s and 1830s, it is very likely that two, and only two, bands were resident there. These were led by *Mongozid* or Loonsfoot and *Shingoop* or Balsam. While it is true that others from Fond du Lac also signed treaties in 1825 and 1826, these were likely lineage heads called "headmen", or perhaps individuals representing warrior factions. What is absolutely remarkable about the Fond

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[18] Hickerson, Harold 1974 *Chippewa Indians III. Ethnohistory of Chippewa of Lake Superior*. New York: Garland Publishing Inc. p. 52.

[19] Mason, Phillip (ed) 1958. *Schoolcraft's Expedition to Lake Itasca*. East Lansing: Michigan State University Press, p. 158. Statistical Table.

du Lac leadership is that these two eminent leaders signed every treaty agreement made between the Lake Superior Chippewa and the United States. This fact provides the band with a consistent view of their relationship with the United States from 1825 until 1854.

The Early European Settlement at Fond du Lac

The French explorers Groseillers and Radisson spent the years of 1659 and 1660 on what they described as "the delightfullest lake of the world". Although they did not travel to the end of Lake Superior, they did become familiar with the Algonquian and

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As a matter of fact, the suspension of Chippewa removal was very much in the spirit of the new policy which was emerging in the Indian office under the direction of Commissioner Luke Lea and Chief Clerk Charles Mix.[160] In reality, however, Ramsey and Watrous totally ignored the suspension order and continued to plan for and encourage the Chippewa to remove. They also continued their policy of paying annuities on unceded land; in 1851 they paid annuities at the nearest location which had not been ceded, that is, at Fond du Lac.

The Fond du Lac bands, while certainly Chippewa of Lake Superior, were residents of the unceded land north of the St. Louis River and were not subject to the Removal Order *per se*. They were most certainly impacted by it.

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[160] Prucha, Paul F. 1986 *The Great Father*. Lincoln: The University of Nebraska Press. p. 64-65.

Not only did annuity payments bring thousands of their fellow Chippewa to Fond du Lac putting great stress on local resources, but other Chippewa began to move to Fond du Lac. Some of this movement was at the encouragement of agent Watrous who designated Fond du Lac as a staging area for moving the Chippewa from interior Wisconsin further west. Others may simply have moved to Fond du Lac to avoid removal west of the Mississippi. In contravention of the 1842 treaty which specified the area north of the St. Louis River as an eventual removal destination, Ramsey and Watrous had decided to remove the Chippewa to the vicinity of Gull Lake near the Crow Wing trading center on the Mississippi. Steamboat traffic on the river made Crow Wing easy to supply from St. Paul, which was, in turn, supplied from St. Louis. It was after all this aspect of the trade which motivated the entire removal effort.[161]

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Q.8. Did the Chippewa peacefully co-exist with the Americans who entered the ceded territory between 1837 and 1851?

A.8.a. Although interaction between the two peoples was occasionally interrupted by violence, such behavior could be traced to the introduction of intoxicating beverages to the ceded territories. In some other few incidents, cultural miscommunication brought trouble between individual Chippewa and American settlers and lumbermen. Finally, the vast majority of interaction between the Chippewa and Americans was peaceful.

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[161] AR M203 R. 4. December 1, 1849. H. Rice to A. Ramsey.

A.8.b. During the Treaty making era, the Chippewa lived at peace with the few American citizens who occupied the 1837 and 1842 cession. The Chippewa established a mutually beneficial commercial relationship with these American citizens which neither they or the Americans were anxious to terminate.

Q.9. Was the 1850 Presidential Order consistent with the way the Chippewa understood their rights to hunt, fish, and gather under Article 5 of the 1837 Treaty?

A.9.a. Since the 1837 Treaty contained no removal provision, the Chippewa resident in the ceded territory did not anticipate removal. Their usufruct right was necessary for their continued residence in the cession since they had no alternative to subsist themselves. The Chippewa did not understand that the 1837 Treaty could be used to terminate their rights under Article 5 to accomplish their removal.

A.9.b. The Fond du Lac Chippewa who were signatories to the 1837 treaty and who used the ceded land did not, however, reside on the cession. The Fond du Lac bands were not subject to the Presidential Order of 1850.

Q.10. Was the 1850 Presidential Order subsequently suspended?

A.10.a. The effort to remove the Chippewa from Wisconsin to Minnesota by means of the Removal Order of 1850 was an ill conceived plan to profit Minnesota

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Expert Report Of Paul Driben, Dated October 28, 1994
For *Fond Du Lac Band Of Indians, Et Al. v. Carlson, Et Al.*, #92-CV-159, *Selected Pages

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

The Fond du Lac Band of Chippewa Indians
and the *Treaty with the Chippewa, 1837*

by

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28 October 1994

* * *

groups. Though the United States may have written treaties with such groups as the "Potawatomi" or the "Ottawa and Chippewa tribe," these distinctions had little or no reality for the Indians. For them, it was the local band that made decisions by the consensus of its members, decisions that were conveyed by the chiefs or headmen who were recognized patriarchs of these local groups.

Since each band consisted of a number of related families who collectively used a set of resources, bands had a territorial dimension.[14]

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[14] *Ibid.*, p. 192. According to Hickerson: "This lack of a concept of common tribal territory is also demonstrated in the

According to the late Harod Hickerson, the Fond du Lac Band conformed to the pattern. Based on his study of

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negotiations of the Treaty of August 19, 1825, the famed boundary treaty at Prairie du Chien, when . . . Chippewa spokesmen from the different villages or regions defined their boundaries not in unison as one people, but in severality." Harold Hickerson, *Chippewa Indians IV: Ethnohistory of Chippewa in Central Minnesota*. New York: Garland Publishing Inc., 1974, p. 19. The Chippewa's antipathy to negotiating treaties as one nation and the government's ethnocentric reaction to this attitude was likewise demonstrated in the negotiations that culminated in the *Treaty with the Chippewa, 1842*. During those negotiations the government's chief spokesman, Robert Stuart, said this: "Some of you have expressed a wish to treat by bands, & others to keep reservations, but I cannot sanction either – your Great Father will not treat with you as Bands, but as a Nation – you, who know any thing of your own history, are aware that when your fathers first came from the east, they drove their enemies [the Sioux] before them and took possession of the whole country; afterwards they separated into Bands, & for convenience took up such hunting grounds as suited them; but this gave the separate Bands no other right to the lands than merely to occupy them for the time being – the whole country is your common property – you may easily see how unjust it would be to recognize the right of property by Bands, for several of your small Bands are scattered over a much larger and better country, than some of your large Bands, and why should this secure them the sole ownership, for are you not all children of the same great Nation? you are; and it pleased me much to hear from most of your Chiefs, that this is your own general view of the subject: altho' a few of those who thought they would gain by it, wished to have it otherwise; – you know that treaties are often made when whole Bands are absent, which could not be but on the principle that all your lands are common property, and the majority of the Nation can sell or not as they please, the absentees being entitled to their share of the annuities &c: – It is all right for you however to live apart as you do, in Bands, each choosing their own hunting grounds, this

a wide variety of primary source documents in conjunction with his pioneering ethnohistorical research on the Chippewa,[15] Hickerson concluded that by 1783 the Fond du Lac Band had become a recognizable entity,[16] and that from then until the mid-point of the nineteenth century its members resided, during the summer, in a village at Fond du Lac, "at the west end of Lake Superior, approximately twenty-five miles north of . . . [the area that was ceded in 1837] where the northern boundary of the area crosses the Wisconsin-Minnesota border."[17] Hickerson also pointed out that while pursuing game and furbearers took the Chippewa away from their summer villages, "as a general rule [they] remained in the drainage region in which their village were located."[18] In the case of the Fond du Lac Band that drainage area was almost entirely outside the 1837 cession. In fact, although band members occasionally visited the St. Peter's Indian

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will prevent many disagreements, and make it easier for you to find game and food in small bands, than if you were all to live together." Robert Stuart, Sketch of Speech to the Indians at La Point by Robert Stuart, Comr., September 29, 1842. *Letters Received, La Pointe Agency*, Microcopy M234, Roll 389, Record Group 75. Washington: National Archives and Records Service.

[15] The primary sources Hickerson examined included reports and letters that were written by explorers, fur traders, missionaries, and government officials, many of whom had first-hand knowledge of the Fond du Lac Band. The sources are listed in Harold Hickerson, *Chippewa Indians III: Ethnohistory of Chippewa of Lake Superior*. New York: Garland Publishing Inc., 1974, pp. [153-162].

[16] *Ibid.*, p. 48.

[17] Hickerson, *Ethnohistory of Chippewa in Central Minnesota*, p. 26.

[18] *Ibid.*, p. 206.

Agency at the junction of the Mississippi and Minnesota Rivers,[19] they did not and had never occupied the cession.[20] Rather, the members of the Fond du Lac Band were Lake Superior fishermen who were more or less "confined to occupancy of the [west end of the] lake shore and the immediate region adjacent to the lake"[21] in an area that included "the headwaters of the main eastern tributaries of the St. Louis River and part of the headwaters of the St. Louis itself"[22] (see Map 2).

Nor did band members need to use the territory that was ceded in the 1837 treaty to satisfy their economic wants and needs; first because even though there were fluctuations, the plants and animals they depended upon for their subsistence were available in their own territory;[23] second because the furs, fish, wild rice, and other items they bartered with

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[19] *Ibid.*, p. 196.

[20] *Ibid.*, p. 26.

[21] *Ibid.*, p. 196.

[22] Hickerson, *Ethonistory of Chippewa of Lake Superior*, p. 144.

[23] Matti Kaups, *Commercialization of Resources by the Ojibwa in the Years 1820-155* [sic] *in the Area Ceded by the Treaty of La Pointe, 1854*. Unpublished manuscript on file at the Fond du Lac Education Division, 1987, pp. 10-19. *Cf.* Edmund J. Danziger, Jr., *The Chippewas of Lake Superior*. Norman: University of Oklahoma Press, 1979, pp. 11-13; Hickerson, *Ethnohistory of the Chippewa of Lake Superior*, pp. 101-144; Matti Kaups, "Ojibwa Fisheries on St. Louis River, Minnesota: 1800-1835" *Journal of Cultural Geography*, 1984, Volume 5, Number 1, pp. 61-83; Carol I. Mason, *Introduction to Wisconsin Indians: Prehistory to Statehood*. Salem, Wisconsin: Sheffield Publishing Company, 1988, pp. 99-120; and Ritzenthaler, "Southwestern Chippewa," pp. 746-747.

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you. They take you by the hand, and would like to see your wish accomplished, that all should return home in peace. But they are afraid to return home, if the traders are not paid. They fear they should not survive during the winter without their aid. It is the wish of the Braves that you should pay the Traders; but they do not want to undo what the Chiefs have done.

My Father. . . . If you will accede to what has been mentioned in regard to the Traders, they will come forward and "touch the pen" (sign the Treaty). We have told you what we want, and after hearing what is to be granted to us, we will go, & prepare to return home.[78]

Dodge then asked whether $70,000 was sufficient, and, after consulting with the warriors and chiefs, Sha-go-bai agreed on their behalf.[79]

Having heard from Sha-go-bai about the traders, it remained for Chief Pe-zhe-ke (The Buffalo) from La Pointe to deal with the question of mixed-bloods. He told Dodge that the previously mentioned sum of $100,000 would be sufficient. As Pe-zhe-ke put it to Dodge: "My Father, you have come here and got all your children together as if you wished to embrace and treaty [sic] them kindly. We approve of what was said and done yesterday, in regard to the half breeds. I am an Indian and do nor know the value of money, but the half breeds do, for which reason we wish you to pay them their share in

[78] *Ibid.*

[79] *Ibid.*, pp. 148-149.

money. You have good judgment in whatever you do, and if you do not act yourself, you will appoint some one else to dividde [sic] it between the halfbreeds."[80] Immediately after Pe-zhe-ke had spoken, the treaty was read aloud, signed, and witnessed.

Aftermath

According to Alfred Brunson, a missionary who was present during the course of the treaty negotiations, by the time the Chippewa delegates had reached their respective homelands there was already dissension among them about the recently concluded agreement. The dissension arose, Brunson intimated, because while only those who used and occupied the cession had ceded their land and believed they could be removed from the cession, the treaty provided the same benefits to *all* of the signatory bands, including those that did not use or occupy the cession. As Brunson put it in a letter to the Corresponding Secretary of his Mission Society:

> This mission [at Lac Court Oreilles] is located within the territory ceded to the United States by the late treaty made at St. Peters. And the chiefs and people residing thereon, returned home very much displeased that their country is sold from under them. Four or five of those chiefs refused to sign the treaty, and declare that they will not receive a particle of pay, nor remove from the country. . . . The disaffected Indians, however, do not complain of the governor [Governor Dodge], as they do of their own

[80] *Ibid.*, p. 150.

> brethren, who live on their unceded lands. They have sold the lands on which they do not live, and from which they have not to remove. It is true the disaffected bands are offered lands in the unceded territory to settle upon, but these say, that as all the best sites are selected and occupied, none but the refuse is left for them, on which there is neither game nor tillable lands.[81]

The signatories whose bands did not use or occupy the cession looked at the treaty in a different way. From their perspective the agreement must have seemed something of a windfall since it provided them with two significant benefits at no cost to themselves. One was that money was set aside to repay what they owed to their traders; William Aitkin, for instance, who was licensed to trade with the Indians at Fond du Lac and its dependencies,[82] was to be paid $28,000 under the terms of treaty.[83] In addition, some of the mixed-bloods who lived among those who did not use or occupy the cession were paid from the fund that had been set aside for that purpose after the chiefs of the bands in the ceded territory adopted "the general rule, that all half breeds, whose parents belonged to, and were born in the ceded country should be entitled to a share of the said fund, provided,

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[81] Alfred Brunson, Letter from Alfred Brunson to Cor. Sec. of Missionary Society of the M. E. Church, August 25, 1837. *Northwest Mission Papers*, Box 1, folder 7, Northeast Minnesota Historical Center, University of Minnesota, Duluth.

[82] Henry Dodge, Abstracts of Licenses to Trade with the Indians, April 1, 1837. *Office of Indian Affairs, Letters Received, Wisconsin Superintendency*, Microcopy M234, Roll 948, Record Group 75. Washington: National Archives and Records Service.

[83] Kappler, *Indian Affairs Laws and Treaties*, volume 2, p. 493.

they had not severed their connection with the Indians residing there, by removing further away from them than St. Peter's on the South West, Lake on the Northwest, Fond du Lac, La Pointe, and Grand Island, on the North. and L'Ance Kewinaw on the North East."[84]

The bands that did not occupy the cession had also left the treaty grounds hoping that they would receive a proportionate share of the annuity that was payable under the terms of the agreement. Chief Buffalo from the La Pointe Band on Lake Superior admitted as much to Sub-agent Bushnell shortly after the treaty was signed. Although Buffalo was quick to point out that since it was not his land that been sold it would not be his "place to come in among the first when the money is paid," he also told Bushnell that "[i]f the Indians that own the land call me in I shall come in with pleasure."[85] And he had good reason to say so because the annuity was substantial; each year for twenty years the signatory bands were to receive $35,000 worth of goods and services, including $19,000 in goods, $9,500 in cash, $3,000 for blacksmith

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[84] Lucius Lyon, Letter from Lucius Lyon to Commissioner of Indian Affairs T. Hartley Crawford, December 16, 1839. *Office of Indian Affairs, Letters Received, La Prince Agency*, Microcopy M234, Roll 388, Record Group 75, Washington: National Archives and Records Service.

[85] Buffalo, Speech of Buffalo, Transmitted by letter From Henry Dodge to Carey A. Harris, February 19, 1838. *Office of Indian Affairs, Letters Received, La Pointe Agency*, Microcopy M234, Roll 387, Record Group 75. Washington: National Archives and Records Service.

shops and supplies, $2,000 in provisions, $1,000 for farmers and agricultural supplies, and $500 in tobacco.[86]

Governor Dodge, however, had empowered the chiefs who were at the treaty grounds to decide which bands should share in these entitlements. "At that treaty [Dodge later told the Commissioner of Indian Affairs], all the bands of the Chippewa nation, west of Lake Michigan, were represented, although several of the chiefs then present, and who signed the treaty, disclaimed any interest in the cession made; declaring that those only who immediately occupied the land sold were entitled to the annuities. It was, however, deemed proper that the whole of the bands should become parties to the treaty, leaving it to the tribe afterward to determine their rights under it."[87]

In the case of the Fond du Lac and La Pointe bands, both of which resided in the vicinity of Lake Superior and did not use or occupy the cession, the determination was made less than a year after the treaty had been signed. On 16 July 1838 Sub-agent Vineyard informed Governor Dodge that "[t]he Indians have settled amongst themselves that no Indians off of the land or borders of the tract sold in the treaty are entitled [to be paid]."[88]

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[86] Kappler, *Indian Affairs Laws and Treaties*, volume 2, p. 493.

[87] Henry Dodge, Report of the Commissioner of Indian Affairs, November 25, 1839. *House of Representatives Executive Document 2*, 26th Congress, 1st Session, Serial 363, pp. 482-486.

[88] Miles M. Vineyard, Letter from Miles M. Vineyard to Henry Dodge, July 16, 1838. *Office of Indian Affairs, Letters Received, Crow Wing Agency*, Microcopy M234, Roll 249, Record Group 75. Washington: National Archives and Records Service.

Nevertheless, when the annuity was paid several months later the Lake Superior Bands received some of the money and goods that were distributed at La Pointe.[89] They were, however, disturbed that the lion's share of the annuity had been distributed on the St. Croix River to those who lived in the ceded territory.[90] The Lake Superior Chippewa were consequently eager to receive a larger share of the annuity when the entire 1839 payment was made at La Pointe. But despite the fact that the annuity was distributed in their territory they did not receive even a meager share; shortly before the payment was made the chiefs from the ceded territory met in council and reaffirmed the decision that it would be inappropriate for the Lake Superior Chippewa to be paid because it was not their land that had been sold. As Sub-agent Bushnell reported to Governor Dodge:

> In pursuance of the instructions contained in your Communication of 29 July [1839] and its enclosure, I have the honor to report;
>
> That the payment to the Chippewas of the Mississippi was concluded at this place on 3

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[89] A. J. Smith, Report of A. J. Smith to Major John Garland, November 5th, 1838. *Office of Indian Affairs, Letters Received, La Pointe Agency*, Microcopy M234, Roll 387, Record Group 75. Washington: National Archives and Records Service. Also see Bushnell, Report of the Commissioner of Indian Affairs, November 25, 1839. *House of Representatives Executive Document 2*, 26th Congress, 1st Session, Serial 363, p. 488.

[90] Frederic Ayer, Letter from Frederic Ayer to David Greene, December 18, 1838. *American Board of Commissioners for Foreign Missions Papers*, Box 2, Minnesota Historical Society, St. Paul. Typescripts of originals from Harvard University, Houghton Library, Cambridge, Massachusetts.

> inst. As I had no special instructions on the subject, I should have paid them according to the precedent of last year; but at the council preceding the payment, the question was stated, What Indians were justly entitled to share in the annuity? It was finally concluded, among themselves, that the Bands occupying the ceded country alone, had a right to it, and the Lake Indians [the Fond du Lac and La Pointe bands] were therefore excluded. This gave rise to a great dissatisfaction on the part of the latter, and they subsequently called a council and requested that the payment should not again be made, on their lands, and intimated that it might be occasion of trouble.[91]

Presumably, too, the chiefs who used and occupied the ceded territory would have balked at the idea that those who did not use or occupy the cession would be able to exercise the privilege to hunt, trap, fish, and gather in the cession, but since there was no reason to suppose that they wished to do so, the chiefs whose land had been sold simply ignored the issue.

In any event, notwithstanding their consternation, the Lake Superior Chippewa had no recourse but to accede to the wishes of their fellow chiefs with regard to the distribution of the annuity. They did so until the ratification of the *Treaty with the Chippewa, 1842* in which many of the same bands that had participated in the 1837 treaty ceded land south of Lake Superior in northern

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[91] Daniel P. Bushnell, Letter from Daniel P. Bushnell to Henry Dodge, September 26, 1839. *Office of Indian Affairs, Letters Received, La Pointe Agency,* Microcopy M234, Roll 387, Record Group 75. Washington: National Archives and Records Service.

Wisconsin and in the northwestern corner of the Upper Peninsula of Michigan.[92] In the negotiations that led up to that treaty, Robert Stuart, the government's chief negotiator, told the Mississippi and Lake Superior Chippewa that, for their own good, they must agree to share the annuities that were payable under the terms of the 1837 treaty and the treaty he had been sent to conclude.

> you shall be paid annually [, he said,] for 25 years $12,500 in specie – $10.500 worth of Goods, & 2000 worth of Provisions and Tobacco: to be paid so that the money, Goods, Provisions & Tobacco, both of this treaty and the Treaty you made with Gov. Dodge at St. Peters in 1837, shall be equally distributed to every person, whether of the Mississippi, or Lake Superior Chippewas, as far up as the Sandy Lake Band, which is included – this will prevent future jealousies and allay the bad feelings which now exist among you, and make you like a band of Brothers; besides it is just and honorable, and no good man will object to what is right.[93]

Article V of the *Treaty with the Chippewa, 1842* was based on this proposition; it stipulated that, in order "to remove all occasion for jealousy and discontent," the annuity payable under both treaties "shall henceforth be equally divided among the Chippewas of the Mississippi and Lake Superior, party to this treaty, so that every

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[92] The bands that were party to both treaties were the Fond du Lac, La Pointe, Red Cedar Lake, Sandy Lake, Gull Lake, Mille Lacs Lake, Snake River, St. Croix River, Lac Court Oreilles, and Lac du Flambeau bands.

[93] Stuart, Sketch of Speech by Robert Stuart, September 29, 1842.

person shall receive an equal share."[94] It was in this way that the members of the Fond du Lac and La Pointe bands, which were party to both of the above mentioned treaties, once again became eligible to receive a share of the annuity that flowed from the treaty was concluded on 29 July 1837 at Fort Snelling.

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[94] Kappler, *Indian Affairs Laws and Treaties*, volume 2, p. 543.